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**ADMINISTRATION'S PROPOSED REGULATIONS FOR
THE OLDER AMERICANS ACT AMENDMENTS OF
1987**

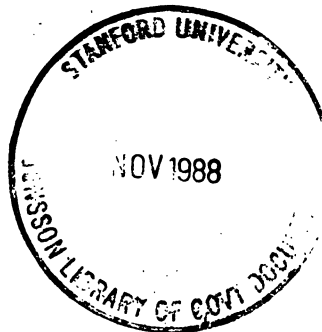
CORD ONLY:

HEARING
BEFORE THE
SUBCOMMITTEE ON HUMAN SERVICES
OF THE
SELECT COMMITTEE ON AGING
HOUSE OF REPRESENTATIVES
ONE HUNDREDTH CONGRESS
SECOND SESSION

APRIL 26, 1988

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ADMINISTRATION'S PROPOSED REGULATIONS FOR THE OLDER AMERICANS ACT AMEND- MENTS OF 1987

TUESDAY, APRIL 26, 1988

U.S. HOUSE OF REPRESENTATIVES,
SELECT COMMITTEE ON AGING,
SUBCOMMITTEE ON HUMAN SERVICES,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in Room 2261, Rayburn House Office Building, Hon. Thomas J. Downey [acting chairman of the subcommittee] presiding.

Members present: Representatives Downey, Slaughter, Snowe and Saiki.

Staff present: Robert B. Blancato, majority staff director; Moya Benoit, majority research assistant; Barbara Kaplan, minority staff director; and Dari Minzner, minority research assistant.

OPENING STATEMENT OF CHAIRMAN THOMAS J. DOWNEY

Mr. DOWNEY. We are just awaiting Congressman Bonker's arrival, but I will convene the subcommittee.

This hearing of the Subcommittee on Human Services is called to order.

Today the subcommittee is conducting a special oversight hearing on the Older Americans Act. Our purpose today is to review and learn reactions to the proposed regulations to implement P.L. 100-175, the Older Americans Act Amendments of 1987.

These regulations were issued in proposed form in the Federal Register on March 29. Public comments are accepted until May 31st. We conduct this hearing to provide a forum for interested parties to make their public comments and it will form the basis for a later communication by this subcommittee to the Administration on Aging prior to the publishing of the final regulations.

It has been the custom of this subcommittee over its 14-year history to focus special attention on the regulations to implement the various amendments to the Older Americans Act. It stems from our belief that regulations which implement the laws we make must accurately reflect the content and intent of these laws.

Regulations must also provide direction for those at State and local levels charged with the responsibility of administering laws. Regulatory review is a critical dimension of congressional oversight, especially for a committee such as ours.

This subcommittee, especially our colleague, Mario Biaggi, played an especially active role in the development of P.L. 100-175.

Essentially, these amendments constitute a fine-tuning of the existing provisions of the Older Americans Act.

However, contained in these amendments were 6 new and important authorizations aimed at specific target groups of the elderly population. These are: in-home services for frail older individuals; long-term care ombudsman services; assistance for special needs; health, education and promotion services; services to prevent abuse, neglect, exploitation of older individuals and outreach activities for persons who may be eligible for benefits under other programs such as SSI, Medicaid and food stamps.

In addition, P.L. 100-175 reaffirmed that the Older Americans Act, in its services to give special priority to those elderly in the "greatest economic or social need with particular attention to low-income minority elderly." It strengthened language spelling out the three priority services under Title III B of the Act are to be in-home, access and legal services.

The act also maintained the direction of allowing maximum flexibility to State and area agencies on aging in the development of service plans. Finally, the law provided some long overdue stability to a key component of the nutrition program by guaranteeing a stable reimbursement rate for nutrition programs no matter how many meals are served.

In addition to my vote in favor of the reauthorization bill, I also supported late last year the continuing appropriation bill which maintained basic funding levels for the programs under the Older Americans Act and provided an initial appropriation of \$4.8 million for the new Title III Part D, In-Home Services for the Frail Elderly.

Today we move into the next phase of implementation, the regulations. Let me first applaud the Administration on Aging, and especially Commissioner Fisk, for submitting these proposed regulations on time.

In addition, I would like to commend AOA for permitting a full 60-day public comment period to allow for the widest possible review.

Further, I wish to commend the Administration on Aging for their efforts at lowering the regulatory burdens associated with the Older Americans Act. I, for one, find it most disturbing to have time that should be spent providing services to needy seniors instead being spent on filling out Federal forms.

I have not yet formulated a final position or comments on these proposed regulations. That is why we are here today, to essentially have the Commission on Aging explain the various provisions in these regulations and to learn what impact they might have on State and local agencies, and most importantly, on the seniors we are to serve.

I do have a number of concerns about aspects of these regulations which I hope can be addressed by the Commissioner during her testimony in response to questions.

At this point, I want to submit the rest of my opening statement for the record and recognize the ranking minority member, Olympia Snowe, a key supporter of the Older Americans Act, for any statements that she might have, and then Congresswoman Saiiki of Hawaii for any comments that she might have.

PREPARED STATEMENT OF REPRESENTATIVE THOMAS J. DOWNEY

This hearing of the Subcommittee on Human Services is called to order. Today, the Subcommittee is conducting a special oversight hearing on the Older Americans Act. Our purpose today is to review and learn reactions to the proposed regulations to implement P.L. 100-175, the Older Americans Act Amendments of 1987.

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This Subcommittee, especially our colleague Mario Biaggi, played an especially active role in the development of P.L. 100-175. Essentially these amendments constituted a "fine tuning" of the existing provisions of the Older Americans Act. However, contained in these amendments were six new and important authorizations aimed at specific target groups of the elderly population.

These are:

- * In-home services for frail older individuals
- * Long Term Care Ombudsman Services
- * Assistance for special needs
- * Health Education and Promotion services
- * Services to prevent abuse, neglect and exploitation of older individuals
- * Outreach activities for persons who may be eligible for benefits under other Federal programs such as SSI, Medicaid and Food Stamps

In addition, P.L. 100-175 reaffirmed that the Older Americans Act in its services to give special priority to those elderly in the "greatest economic or social need with particular attention to the low income minority elderly." It strengthened language spelling out that the three priority services under Title III B of the Act are to be in-home, access and legal services.

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Further, I wish to commend the Administration on Aging for lowering the regulatory burdens associated with the Older Americans Act. I for one find it most disturbing to have time that should be spent providing services to needy seniors, instead being spent on filling out federal forms.

I have not yet formulated a final position or final comments on these proposed regulations. That is why we are here today--to essentially have the Commissioner on Aging explain the various provisions in these regulations and to learn what impact they might have on state and local agencies and most importantly, on the seniors we are to serve.

I do have a number of concerns about aspects of these regulations which I hope can be addressed by the Commissioner during her testimony and response to questions. I have concerns about the language dealing with advocacy responsibilities of state and area agencies on aging. Congress made its intent on advocacy clear throughout the reauthorization process and reiterated it in the final Conference Report. At issue was language in the existing regulations which stated that nothing in the advocacy responsibilities under the Older Americans "shall be deemed to supercede statutory or other regulatory restrictions regarding lobbying or political advocacy with Federal funds." In light of stated Congressional intent to the contrary, my question to the Commissioner is: Why was this section retained in the proposed regulations?

I have questions about the basis for the new requirement spelled out in the regulations that state and area agencies on aging develop a "mission statement." I am not clear about its statutory basis.

I have concerns about the new language dealing with the withdrawal of designations of area agencies on aging. I have questions as to why existing regulations on the home delivered meals programs were deleted. I would also like to know why the regulations do not implement the new provisions of P.L. 100-175 dealing with expanded outreach services to better link poor seniors to key programs such as SSI and Medicaid.

We are pleased that the Commissioner on Aging has joined us this morning. In addition we have invited a cross section of those in the aging network with direct responsibility for administering the Older Americans Act programs. All of their input is critical to this hearing and our overall oversight mission.

I now wish to recognize my colleagues here today and thank them for their presence.

####

STATEMENT OF REPRESENTATIVE OLYMPIA J. SNOWE

Ms. SNOWE. Thank you, Mr. Chairman.

I think you have clearly outlined the issues that we are going to be addressing here today. I want to commend you for holding this hearing, and also commend the Administration on Aging for the excellent work that they have done in proposing these regulations in a very timely fashion.

Having said that, I think, obviously, we have to carefully review the proposed regulations. It is essential that we continue to foster a very close relationship between the Administration on Aging, the State units and the area agencies as well.

I have a number of issues that I look forward to raising here today. Again, Mr. Chairman, I commend you for holding this hearing.

Mr. DOWNEY. Thank you, Congresswoman Snowe.
Congresswoman Saiki.

STATEMENT OF REPRESENTATIVE PATRICIA F. SAIKI

Mrs. SAIKI. I, too, would like to add my commendations to you, Mr. Chairman. I would like to enter a statement for the record.

Mr. DOWNEY. Without objection, it is so ordered.

Mrs. SAIKI. Thank you.

[The prepared statement of Mrs. Saiki follows:]

OPENING STATEMENT BY CONGRESSWOMAN PATRICIA SAIKI
BEFORE THE SUBCOMMITTEE ON HUMAN SERVICES

APRIL 26, 1988

I am pleased to have this opportunity to participate in the review of the Older Americans Act regulations and the administration of health care for older Americans. I am particularly interested in this subject as Native Hawaiians are recognized in a new amendment to Title VI programs. For the first time ever, grants to the sum of \$1.3 million and a \$3 million revolving loan fund have been authorized for the sole benefit of older Hawaiians.

Many are not aware of the problems facing this group of people. I would like to take a moment to read a few lines from an information paper prepared by the Senate Special Committee on Aging. "Congressional findings state that (Native Hawaiians) have a life expectancy 10 years less than any other ethnic group in the State; rank lowest on 9 of 11 standard health indices for all ethnic groups in the State; are often unaware of social services; and have a poverty rate of 34 percent."

Compare these statistics to the national average and you will be astounded. Only 12.4 percent of the U.S. population is under the poverty level according to a recent study. The life expectancy for the average American is 74.7 years whereas Hawaiians are expected to live to only 64.7 years of age. The health standard indices speak for themselves. With this in mind, you can understand why I see this Act as vitally important to the people of my state.

I am confident that the programs resulting from these grants will help us reach-out to this population in a way that has not been possible before.

This is a very valuable piece of legislation to the elderly in my state and I would like to thank the administration, my colleagues and those responsible for the preparation of this Act. And to the witnesses here with us today, thank you in advance for your expert testimony on the regulations put forth.

Mr. DOWNEY. We are privileged to hear from our colleague, Congressman Bonker, who is our lead-off witness and also a member of the Committee on Aging and chairman of the Subcommittee on Housing and Consumer Interests.

Don, please proceed.

STATEMENT OF REPRESENTATIVE DON BONKER

Mr. BONKER. Thank you, Mr. Chairman, and I appreciate this opportunity to appear before your subcommittee this morning.

As you know, I chair the Subcommittee on Housing and Consumer Interests, and I believe that the Select Committee on Aging is a strong advocate for senior citizens with respect to Federal programs that are so vital to their livelihood. I want to join with your colleagues in commending you and commending Ms. Snowe for your leadership in this area.

Mr. Chairman, I have a statement I would like to submit for the record.

Mr. DOWNEY. Without objection, your statement will be submitted in its entirety.

Mr. BONKER. I will just be very brief in my remarks.

When I served as a staff assistant to the Senate Select Committee on Aging in 1964, it was a landmark year because the Congress enacted both the Medicare Act and the Older Americans Act. So I have watched over the years these programs as they have matured, as we in Congress have attempted to strengthen and make more effective, particularly the provisions involved in the Older Americans Act.

In those years, it seemed like we were on the offensive. We were trying to develop a strategy to meet the critical needs of senior citizens and it seems like these days, we are in a defensive position, due in part of budget cuts and sometimes to administrations that don't share our strong commitment to the programs.

I feel as if we are in a similar position today. Housing programs, as you know, have been cut by 70 percent and when that budget pie shrinks, then the squeeze is on in many of these areas that are so vital for senior citizens.

Mr. Chairman, I will just limit my remarks to 3 areas of particular interest because Congressman Biaggi and I offered some amendments to the reauthorization bill last year and we want to make sure that through oversight, that the Administration is on target with respect to these changes in the law.

The first has to do with the long-term care ombudsman program, which was strengthened with language that we offered last year. The second has to do with the Indian program, which is of special need, and I will comment on that in a moment. Third, with respect to the area agencies, that they may be maintained as autonomous entities.

First, with respect to the ombudsman program, Mr. Chairman, this program has been around for a while, but we are concerned that there has not been an aggressive effort, or at least a strong commitment to ensuring that an ombudsman program is a real appeal, if you will, to those who find conditions in nursing homes not the most favorable.

I speak from personal experience because my father is in a nursing home and I see many of the deplorable conditions. It is truly institutionalized care and often it is totally devoid of any personal interest in the patients. While I don't have any personal problems with the nursing home where he is a resident, I can see clearly the need. If you find that a patient is being mistreated or not receiving a level of care that you would like, it is good to have someone to go to who can cut through all the red tape and bring some results.

The ombudsman program is really the only aspect of OAA that is devoted to serving the needs of long-term care facility residents who are among our society's most vulnerable citizens.

The Administration on Aging has stressed the need for States to provide assurances that the new provisions will be implemented. Of equal importance, however, will be the oversight by OAA of States to determine that they have effective ombudsman programs.

Frankly, Mr. Chairman, in the past, OAA has done a poor job of monitoring the States. In part, the new provisions were necessary because of inadequate programs in many of the States. Now, there are some are doing well and some that are not, but it seems to me that the Federal agency involved ought to aggressively pursue higher standards for these ombudsman programs throughout the country.

Along these lines, I strongly urge OAA to ensure that actual and potential conflicts of interest do not exist in States and local ombudsman programs. What I am referring to, Mr. Chairman, are those instances where the ombudsman program is really part of the apparatus, if you will, that works with nursing home operators.

We feel that if an ombudsman program is to be separate and apart and maintain its integrity and really pursue the welfare of the patient, that it cannot be part of the organization that administers nursing home programs in their respective States.

With respect to the issue of access to ombudsman files, the statute is clear in prohibiting access by anyone other than an ombudsman to the identities of the complainants and the facility residents. While there is clearly legitimate concern over supervision, the proposed rule, as drafted, is inconsistent with the statute and is likely to create more confusion than it resolves.

The second area I would like to address very briefly, Mr. Chairman, concerns older Indians. I imagine Ms. Snowe has a number of Indian residents, as I do in the State of Washington, and if there is really an acute area for the elderly, it has to be in the Indian communities, on reservations. I say that because many of them simply do not have the same benefits that other working people or retired people have. Many of them don't have pensions; many of them are quite removed from the agencies where the services are provided.

So I think Congress has made it clear it wants to place a special emphasis on elderly Indians. The legislation eliminated the harmful provision that prohibited individuals eligible for Title VI services under the OAA from receiving Title III services, so I believe that the proposed regulations should provide guidance as to coordination that will really be necessary as a result of this change in the law.

Finally, Mr. Chairman, the area agencies. I have long been interested in this subject because the area agencies really are the clear-

inghouse, the focal point of the administration of many of these programs. It was our belief that when an area agency is housed within a larger sponsoring agency, it should be a single organizational unit; that is, an area agency's function should not be diffused throughout a larger multipurpose organization. The problem, of course, is an obvious one. As long as the area agency maintains its autonomy, it can become more accountable for the programs that it administers. I think for all involved, it will be less confusing. But if governments attempt to merge area agencies into a broader organization, oftentimes it loses its identity, and if anything, we need to maintain not only the identity, but the integrity of these programs.

The amendment itself does not prohibit the placement of an area agency within an umbrella agency. Our intent merely is to make sure that it does not lose its identity.

Again, Mr. Chairman, there are some States that have excellent programs and have no fear from this kind of oversight, but many other States simply, for organizational or efficiency purposes, have merged the agencies to a point where they no longer are vital entities in serving senior citizens.

Mr. Chairman, that concludes my remarks and I will, of course, be delighted to answer any questions.

I want to thank you again for this opportunity.

[The prepared statement of Mr. Bonker follows:]

Congressman
Bonker News...
 Democrat — Third Congressional District, Washington State

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TESTIMONY BY
 REPRESENTATIVE DON BONKER
 CHAIRMAN - SUBCOMMITTEE ON HOUSING AND CONSUMER INTERESTS

BEFORE THE
 SUBCOMMITTEE ON HUMAN SERVICES
 HOUSE SELECT COMMITTEE ON AGING
 APRIL 26, 1988

GOOD MORNING, MR. CHAIRMAN. I THANK YOU FOR INVITING ME TO TESTIFY BEFORE YOUR DISTINGUISHED SUBCOMMITTEE THIS MORNING. I COMMEND YOU FOR CALLING THIS HEARING TO CONSIDER THE NOTICE OF PROPOSED RULEMAKING WHICH THE ADMINISTRATION ON AGING (AOA) HAS PRINTED IN THE FEDERAL REGISTER. THIS IS AN EXTREMELY IMPORTANT OPPORTUNITY THAT YOU HAVE CREATED FOR THOSE OF US WHO HAVE PLAYED ROLES IN WRITING THE OLDER AMERICANS ACT AMENDMENTS OF 1987, AND FOR OTHER INTERESTED PARTIES TO COMMENT ON THESE PROPOSALS BY THE AOA. I HOPE THAT THE COMMISSIONER IS OPEN TO HEARING OUR CONCERNS AND WILLING TO BE FLEXIBLE AND ADJUST THE PROPOSED RULEMAKING TO SERVE THE BEST INTERESTS OF THE OLDER AMERICANS THAT THE LAW WAS CREATED TO SERVE.

MR. CHAIRMAN, I KNOW THAT THIS IS THE FIRST HEARING THAT YOU HAVE CONDUCTED IN WASHINGTON, D.C., AS ACTING CHAIRMAN OF THE SUBCOMMITTEE ON HUMAN SERVICES, AND I WELCOME YOU TO THAT CRUCIAL ROLE ON THE AGING COMMITTEE. I KNOW THAT YOU WILL SERVE THE PUBLIC WELL, AND IN THE EXCELLENT TRADITION THAT REPRESENTATIVE MARIO BIAGGI HAS ESTABLISHED FOR OVER A DECADE.

AS YOU KNOW, I WORKED QUITE CLOSELY WITH THE OTHER MEMBERS OF THE AGING COMMITTEE AND THE COMMITTEE ON EDUCATION AND LABOR, WHICH HAS AUTHORIZING RESPONSIBILITY FOR THE OLDER AMERICANS ACT (OAA), DURING THE 1987 REAUTHORIZATION PROCESS. I BELIEVE THAT WE WERE VERY SUCCESSFUL IN MAKING THE NECESSARY CHANGES TO EXPAND AND IMPROVE SERVICES PROVIDED BY THE OAA TO OLDER ADULTS ACROSS THE NATION. WE HAVE NOW REACHED THE POINT WHEN CONGRESS AND OTHERS NEED TO COMMENT ON THE AOA'S INTERPRETATION OF THE 1987 AMENDMENTS THROUGH THEIR PROPOSED RULEMAKING. I WOULD LIKE TO TOUCH BRIEFLY ON THREE AREAS OF PARTICULAR INTEREST TO ME: 1) THE LONG-TERM CARE OMBUDSMAN PROGRAM - WHICH WAS STRENGTHENED WITH LANGUAGE THAT I DRAFTED AS H.R. 2042; 2) PROGRAMS FOR OLDER INDIANS - WHICH WERE EXPANDED AND IMPROVED WITH PROVISIONS THAT MR. BIAGGI AND I INTRODUCED AS H.R. 2163; AND 3) THE ISSUE OF AREA AGENCIES ON AGING AS SINGLE ORGANIZATIONAL UNITS.

I WOULD LIKE TO FOCUS MY INITIAL COMMENTS THIS MORNING ON THE LONG-TERM CARE OMBUDSMAN PROGRAM. AS YOU ARE AWARE, I INTRODUCED LEGISLATION — THE "STATE LONG-TERM CARE OMBUDSMAN ADVOCACY IMPROVEMENT ACT" — EARLY LAST YEAR. SENATOR GLENN INTRODUCED A SIMILAR BILL IN THE SENATE. I AM VERY PLEASED TO SAY THAT MUCH OF THE LANGUAGE FROM OUR BILLS WAS INCORPORATED INTACT INTO THE 1987 OAA AMENDMENTS. I MUST USE THIS OPPORTUNITY TO RECOGNIZE THE EFFORT OF OUR COLLEAGUE, MARIO BIAGGI, WHO TOOK THE LEAD IN ENSURING THAT MY OMBUDSMAN PROVISIONS WERE AMENDED INTO THE OAA REAUTHORIZATION LEGISLATION DURING MARK-UP BY THE EDUCATION AND LABOR COMMITTEE.

I AM PROUD OF THE NEW PROVISIONS GOVERNING THE OMBUDSMAN PROGRAM. THEY COMPLIMENT AND BUILD UPON A SOLID FOUNDATION THAT CONGRESS PROVIDED WHEN OMBUDSMAN SERVICES WERE INCLUDED IN THE ACT IN 1978. THIS IMPORTANT PROGRAM IS THE ONLY COMPONENT OF THE OAA DEVOTED TO SERVING THE NEEDS OF NURSING HOME RESIDENTS, WHO ARE CLEARLY AMONG OUR SOCIETY'S MOST VULNERABLE CITIZENS.

OVER THE PAST FEW YEARS, THE IMPORTANCE OF OMBUDSMEN AS ADVOCATES FOR THE INSTITUTIONALIZED ELDERLY HAS BECOME WIDELY RECOGNIZED. AS PART OF THIS INCREASED RECOGNITION, HOWEVER, WAS CLEAR EVIDENCE THAT OMBUDSMAN PROGRAMS IN FAR TOO MANY STATES NEEDED TO BE STRENGTHENED, IN TERMS OF AVAILABLE FUNDING AND RESOURCES, AND CLARIFICATION OF PROGRAM AUTHORITY AND RESPONSIBILITY.

THE INSTITUTE OF MEDICINE (IOM), PART OF THE NATIONAL ACADEMIES OF SCIENCE, AS PART OF THEIR CONGRESSIONALLY-REQUIRED REPORT "IMPROVING THE QUALITY OF CARE IN NURSING HOMES," ISSUED IN EARLY 1986, CALLED FOR SIGNIFICANT IMPROVEMENTS IN THE OMBUDSMAN PROGRAM. IN ADDITION, HEARINGS BY BOTH THE HOUSE AND SENATE AGING COMMITTEES ALSO CALLED FOR THE STRENGTHENING OF THE OMBUDSMAN PROGRAM. THE NEW PROVISIONS REFLECT THE FINDINGS AND RECOMMENDATIONS OF THESE AND OTHER ENTITIES, AS WELL AS PROVISIONS THAT HAVE BEEN ADOPTED BY SOME STATES IN THEIR OMBUDSMAN ENABLING LEGISLATION.

IN GENERAL, I BELIEVE THE STATUTORY LANGUAGE IS SUBSTANTIVE AND CLEAR ENOUGH TO STAND ON ITS OWN. THERE ARE, HOWEVER, SEVERAL AREAS WHERE REGULATIONS WOULD BE USEFUL IN PROVIDING CLEAR DIRECTION TO THE STATES AND TO OMBUDSMEN IN HELPING THEM TO CARRY OUT THEIR RESPONSIBILITIES IN PROTECTING THE RIGHTS OF LONG-TERM CARE FACILITY RESIDENTS AND INVESTIGATING AND RESOLVING THEIR COMPLAINTS.

IN PARTICULAR, I WISH TO ADDRESS THE FOLLOWING POINTS IN MY COMMENTS TODAY.

THE PROPOSED REGULATIONS DEFINE THE TERM "ADMINISTRATIVE ACTION." I AM BAFFLED AS TO WHY THIS DEFINITION IS ADDED. THE 1987 AMENDMENTS SPECIFICALLY DELETED THE TERM "ADMINISTRATIVE" FROM SECTION 307(a)(12)(A)(i). MOREOVER, THE BALANCE OF THIS PARTICULAR PROVISION IS VIRTUALLY IDENTICAL TO LANGUAGE FROM A FORMER REGULATION THAT WAS DROPPED BY THE ADMINISTRATION SEVERAL YEARS AGO. THEREFORE, IT IS INAPPROPRIATE, AND WOULD BE VERY CONFUSING, TO

REFER TO THE TERM "ADMINISTRATIVE ACTION."

THE DEFINITION OF "OFFICIAL DUTIES" SEEMS REASONABLE. IT MAY BE HELPFUL, HOWEVER, TO INCLUDE OTHER RELATED DUTIES THAT STATE LAW REQUIRES OF OMBUDSMAN. THIS WOULD REFLECT THE FACT THAT A NUMBER OF STATES HAVE ADDRESSED IN STATE LAW AND POLICY A VARIETY OF DIFFERENT FUNCTIONS INVOLVING OMBUDSMEN IN THEIR ROLE OF PROTECTING LONG-TERM CARE FACILITY RESIDENTS.

THE ADMINISTRATION ON AGING (AOA) IS TO BE COMPLIMENTED FOR STRESSING THE IMPORTANCE OF STATES PROVIDING ASSURANCES RELATED TO THE OMBUDSMAN PROGRAM AS PART OF THEIR STATE PLANS AND REQUIRING STATES TO DEVELOP POLICIES GOVERNING THE PROGRAMS. I HOPE, OF COURSE, THAT STATES WILL PROVIDE THE ASSURANCES AND DEVELOP APPROPRIATE POLICIES.

OF EQUAL IMPORTANCE, IN MY JUDGEMENT, WILL BE THE OVERSIGHT PROVIDED BY THE AOA. QUITE FRANKLY, AOA HAS A VERY POOR RECORD OF MONITORING STATES' PERFORMANCE IN THE WAY THE OMBUDSMAN PROGRAM HAS DEVELOPED AND OPERATES — THEY HAVE ESSENTIALLY TURNED THEIR HEADS AND IGNORED SITUATIONS IN SOME STATES WHERE OMBUDSMAN ARE NOT PERFORMING EFFECTIVELY DUE TO A VARIETY OF REASONS. FOR EXAMPLE, WHAT OVERSIGHT AND ACTION HAS AOA TAKEN IN THE PAST IN STATES THAT HAVE NOT PROVIDED THEIR OMBUDSMEN WITH ACCESS TO NURSING HOMES? A MAJOR IMPETUS BEHIND THE NEW PROVISIONS AND CALLS FOR STRENGTHENING THE PROGRAM WERE THE INADEQUACIES OF SOME STATES WITH REGARD TO THE OMBUDSMAN PROGRAM.

IT IS MY HOPE THAT THE COMMISSIONER WILL OFFER SOME INSIGHT FOR THE RECORD AS TO AOA PAST EFFORTS TO PROVIDE OVERSIGHT OF THE OMBUDSMAN PROGRAM AND WHAT SPECIFIC PLANS AOA HAS TO ENSURE THAT THE NEW PROVISIONS ARE COMPLIED WITH. WHAT STEPS WILL BE TAKEN TO ENSURE THAT ADEQUATE LEGAL REPRESENTATION IS BEING PROVIDED OR THAT IMMUNITY FOR GOOD FAITH PERFORMANCE HAS BEEN ESTABLISHED FOR STATE AND SUBSTATE OMBUDSMEN?

ALONG THESE LINES, I AM DEEPLY CONCERNED ABOUT AOA'S PLANS TO ENSURE THAT CONFLICT OF INTERESTS DO NOT EXIST IN STATE'S OMBUDSMAN PROGRAMS. WE TOOK GREAT PAINS TO ENSURE THAT THIS PROGRAM IS FREE OF CONFLICTS OF INTEREST. SINCE OMBUDSMEN DO NOT HAVE ENFORCEMENT POWERS, THEIR STRENGTH IS BASED PRIMARILY UPON THEIR CREDIBILITY AND ADVOCACY SKILLS. THE PERCEPTION OF A CONFLICT OF INTEREST CAN BE EVERY BIT AS DAMAGING AS AN ACTUAL CONFLICT OF INTEREST. THEREFORE, EVERY EFFORT MUST BE TAKEN TO AVOID EVEN THE APPEARANCE OF A CONFLICT OF INTEREST.

IN THIS CONTEXT, I AM DEEPLY DISAPPOINTED IN AOA'S DECISION IN THE DISCUSSION PRECEDING THE PROPOSED RULE TO INTERPRET SECTION 307(a)(12)(A) AS ALLOWING STATE AGENCY'S WHICH HAVE THE FUNCTION OF LICENSING OR CERTIFYING LONG-TERM CARE FACILITIES TO ALSO OPERATE THE OMBUDSMAN PROGRAM. AOA HAS CHOSEN TO INTERPRET THE STATUTE AS ONLY PROHIBITING THE OMBUDSMAN FUNCTION TO BE LOCATED WITH THE LICENSING AND CERTIFICATION FUNCTIONS WHEN THE OMBUDSMAN PROGRAM IS CONTRACTED TO ANOTHER AGENCY OR ORGANIZATION. CLEARLY,

CONGRESS INTENDED THAT A FIRM DISTINCTION BE MADE BETWEEN THE OMBUDSMAN AND LICENSURE/CERTIFICATION FUNCTIONS. LOGICALLY, IF IT IS PERCEIVED TO BE A CONFLICT WHEN CONTRACTED OUT, THERE MUST BE A CONFLICT WHEN OPERATED IN-HOUSE. IN FACT, AOA ACKNOWLEDGES THIS BY STATING THAT STATES WOULD HAVE TO "PROMULGATE SPECIFIC POLICIES AND PROCEDURES TO ASSURE THAT NO CONFLICTS OF INTEREST WILL OCCUR" WHEN THE STATE AGING AGENCY ALSO LICENCES OR CERTIFIES LONG-TERM CARE FACILITIES. I RECOMMEND THAT AOA RECONSIDER THEIR INTERPRETATION OF THIS PROVISION AND THAT THE COMMISSIONER PROVIDE THE COMMITTEE WITH A CLEAR SENSE OF HOW OVERSIGHT ON THIS AND OTHER POTENTIAL CONFLICTS OF INTERESTS WILL BE PROVIDED.

ONE OF THE MOST SENSITIVE AND CONTENTIOUS SECTIONS OF THE PROPOSED RULE INVOLVES THE QUESTION OF WHO HAS ACCESS TO OMBUDSMAN FILES, INCLUDING THE IDENTITIES OF COMPLAINANTS AND FACILITY RESIDENTS. AOA, IN PREPARING THE DRAFT RULE, HAS MADE AN ATTEMPT TO ADDRESS LEGITIMATE CONCERNS ABOUT SUPERVISION OF OMBUDSMEN BY THE STATE AGENCY. UNFORTUNATELY, THE PROPOSED RULE IS INCONSISTENT WITH THE STATUTE AND IS LIKELY TO CREATE MORE CONFUSION AND CONTENTION THAN IT RESOLVES.

AS I INDICATED EARLIER, THE CORNERSTONE OF OMBUDSMAN EFFECTIVENESS IS THEIR CREDIBILITY; TO BE SUCCESSFUL, THEY MUST EARN THE TRUST OF THEIR CLIENTS. THIS IS POSSIBLE, IN LARGE PART, BECAUSE OF THE OMBUDSMAN'S ABILITY, BASED ON THE OAA, TO PROVIDE COMPLETE ASSURANCE OF CONFIDENTIAL TREATMENT OF THEIR COMPLAINT. BECAUSE OF MY BELIEF, AND THAT OF MY COLLEAGUES, THAT THE EXISTING LAW WAS CLEAR ON THIS POINT, WE DID NOT ATTEMPT TO AMEND THIS PORTION OF THE OAA'S OMBUDSMAN PROVISIONS. SINCE THE CONFIDENTIALITY AND DISCLOSURE PROVISIONS WERE NOT AMENDED IN 1987, I QUESTION WHY AOA IS ADDRESSING THEM IN THIS PROPOSED RULE, YET STATING THAT (AOA IS "SOLICITING COMMENTS ONLY ON THOSE SECTIONS OF THE REGULATIONS NOTED BELOW WHICH DISCUSS NEW OR REVISED REGULATORY PROVISIONS."

THIS POINT NOTWITHSTANDING, I OFFER THE FOLLOWING COMMENTS. FIRST, THE OAA'S PROHIBITION ON DISCLOSURE OF THE IDENTITIES OF COMPLAINANTS AND RESIDENTS MUST BE REINFORCED. WHILE SECTION 1321.51(a) ADDRESSES PROTECTING THE IDENTITIES OF OLDER PERSONS, IT MUST, AT MINIMUM, BE LINKED DIRECTLY TO SEC. 1321.51(d) AND SPECIFICALLY INCLUDE, FOR THE PURPOSES OF OMBUDSMAN OFFICES, COMPLAINANTS AND FACILITY RESIDENTS OF ANY AGE. FURTHERMORE, I RECOMMEND THAT THE AOA ALSO ENSURE COMPLETE CONFIDENTIALITY FOR INFORMANTS AND WITNESSES, UNLESS THEY AUTHORIZE DISCLOSURE OR A COURT ORDERED DISCLOSURE.

SECOND, ASSURING THAT THE ABOVE IDENTITIES REMAIN PROTECTED (AS THE LAW DIRECTS WITH RESPECT TO COMPLAINANTS AND RESIDENTS), ACCESS TO OMBUDSMAN FILES, IN LIGHT OF OAA SECTIONS 307(a)(12)(B) AND (D), SHOULD BE LIMITED TO THE STATE DIRECTOR AND PERHAPS ONE OTHER SUPERVISORY PERSON WITH RESPONSIBILITY FOR THE OMBUDSMAN OFFICE. HOWEVER, THE REGULATION MUST SPECIFICALLY EXCLUDE STATE DIRECTORS IN CLEAR CONFLICT SITUATIONS. FOR EXAMPLE, THE WASHINGTON, D.C. STATE UNIT ON AGING OPERATES A NURSING HOME. CLEARLY, IT WOULD BE INAPPROPRIATE FOR THE DIRECTOR OF THIS AGENCY TO HAVE ACCESS TO OMBUDSMAN FILES.

TO LEAVE OPEN THE QUESTION OF THE NUMBER OF PERSONNEL WITH ACCESS TO OMBUDSMAN FILES IS INCONSISTENT WITH THE CONGRESSIONAL INTENT DATING TO THE 1978 AMENDMENTS TO THE ACT TO PROTECT THE CONFIDENTIALITY OF OMBUDSMAN PROGRAM INVESTIGATIONS. MOREOVER, THE STATE PLAN SHOULD INCLUDE THE SPECIFIC STATE POLICIES TO PROTECT CONFIDENTIALITY AND OMBUDSMAN FILES.

THIRD, THE FINAL RULE MUST ENSURE THAT ACCESS TO FILES IS LIMITED TO STATE LEVEL PERSONNEL, INCLUDING THE STATE OMBUDSMAN. WHILE DISCUSSION OF SECTION 1321.51(d) STATES THAT THE "STATE AGENCY ON AGING HAS THE RIGHT OF ACCESS TO THE FILES OF THE OFFICE..." (FEDERAL REGISTER, PAGE 10110), THE ACTUAL PROPOSED RULE MAY BE INTERPRETED BY SOME TO ALLOW ACCESS TO SUBSTATE OMBUDSMAN FILES BY NON-STATE LEVEL PERSONNEL. THE FINAL RULE MUST CLARIFY THIS POINT TO BE CONSISTENT WITH CONGRESSIONAL INTENT.

IN ADDITION TO MY COMMENTS REGARDING OMBUDSMAN-RELATED SECTIONS OF THE PROPOSED RULE, FOR THE RECORD I WOULD LIKE TO TOUCH QUICKLY ON SEVERAL OTHER CONCERNS. IT IS MY HOPE THAT THE COMMISSIONER WILL PROVIDE INFORMATION TO THE COMMITTEE ON THESE ISSUES.

1. A DESCRIPTION OF HOW OAA FUNDING WAS ALLOCATED TO THE STATES FOR FISCAL YEAR 1988 AND HOW THESE FUNDS ARE SPECIFICALLY USED FOR OMBUDSMAN SERVICES. ALSO, WHAT EFFORTS AOA MADE TO REQUEST OR DISCUSS THE NEED FOR OMBUDSMAN FUNDS IN THE PRESIDENT'S FY 1988 BUDGET.
2. AOA'S PLANS TO CONDUCT THE OMBUDSMAN STUDIES REQUIRED BY THE 1987 AMENDMENTS.
3. THE STATUS OF AND PLANS FOR THE TWO DEMONSTRATION PROGRAMS INCLUDED IN THE 1987 AMENDMENTS: 1) THE "OMBUDSMAN AND ADVOCACY DEMONSTRATION PROJECTS" (SECTION 427); AND 2) "CONSUMER PROTECTION DEMONSTRATION PROJECTS FOR SERVICES PROVIDED IN THE HOME" (SECTION 438).
4. AOA'S PLANS TO PROVIDE TRAINING AND TECHNICAL ASSISTANCE TO STATE LONG-TERM CARE OMBUDSMAN PROGRAMS AND TO INDIVIDUALS DESIGNATED TO BE REPRESENTATIVES OF A LONG-TERM CARE OMBUDSMAN — THOSE IN THE SUBSTATE PROGRAMS.

THE SECOND SET OF ISSUES ON WHICH I WOULD LIKE TO COMMENT PERTAIN TO THE PROPOSED RULEMAKING AS IT RELATES TO PROGRAMS FOR OLDER INDIANS. TO BEGIN, I AM CONCERNED ABOUT THREE IMPORTANT CHANGES IN THE LAW FOR WHICH NO PROPOSED RULEMAKING HAS BEEN OFFERED BY THE AOA. FIRST, CONGRESS HAS AMENDED THE OAA TO ALLOW OLDER INDIANS TO BENEFIT FROM TITLE III PROGRAMS AND FOR TRIBES TO ACT AS AREA AGENCIES ON AGING. PREVIOUS LAW HAD MADE OLDER INDIANS WHO WERE MEMBERS OF TRIBES WHICH RECEIVE TITLE VI GRANTS INELIGIBLE TO RECEIVE ANY TITLE III SERVICES, REGARDLESS OF WHETHER THEY WERE AVAILABLE THROUGH THE TITLE VI GRANT. IN MANY CASES, TITLE VI GRANTS

PROVIDE FEW SERVICES. THEREFORE, MANY VERY NEEDY OLDER INDIANS WERE NOT BEING SERVED BY THE OAA BECAUSE WE HAD NOT ALLOWED TITLES III AND VI TO BE APPROPRIATELY COORDINATED. MY CONCERN, MR. CHAIRMAN, IS THAT THERE ARE NO PROPOSED REGULATIONS FOR ADDRESSING THE NEEDED COORDINATION TO ENSURE THAT SERVICES ARE PROVIDED TO OLDER INDIANS IN THE FUTURE.

I AM INTERESTED IN KNOWING HOW THIS COORDINATION WILL BE DONE AND WHO WILL OVERSEE IT. IF RULEMAKING IS NOT NECESSARY IN THIS AREA, HOW DOES THE COMMISSIONER PLAN TO ENFORCE THE NEW LAW?

SECOND, THE PROPOSED RULEMAKING MAKES NO REFERENCE TO THE LAW'S MANDATE FOR THE COMMISSIONER ON AGING TO ESTABLISH AN OFFICE FOR AMERICAN INDIAN, ALASKAN NATIVE, AND NATIVE HAWAIIAN PROGRAMS TO BE HEADED BY AN ASSOCIATE COMMISSIONER FOR AMERICAN INDIAN, ALASKAN NATIVE, AND NATIVE HAWAIIAN PROGRAMS. AGAIN, I WILL STATE THAT IF THERE IS GOOD REASON THAT THERE SHOULD BE NO REGULATION WITH REGARD TO THIS IMPORTANT ELEMENT OF THE 1987 AMENDMENTS, I AM WILLING TO CONSIDER THE PLANS THE COMMISSIONER HAS FOR THIS AREA, BUT I WOULD LIKE TO KNOW IF THE INTENT OF THE LAW WILL BE CARRIED OUT.

I WOULD LIKE TO KNOW WHAT PROCEDURES ARE TAKING PLACE TO DEVELOP THIS OFFICE FOR AMERICAN INDIANS AND THE NEW ASSOCIATE COMMISSIONER'S POSITION. WHAT PARTS OF THE DEPARTMENT OF HHS ARE INCLUDED IN THIS PLANNING AND ANY RELATED POLICY DECISIONS? I THINK THE COMMITTEE WOULD LIKE TO KNOW WHAT IF ANY ACTION HAS BEEN TAKEN TO DATE. IN ADDITION, I WOULD LIKE SOME ASSURANCES FROM THE COMMISSIONER THAT THE NEW ASSOCIATE COMMISSIONER WILL BE GIVEN THE SAME LEVEL OF AUTHORITY, PAY, AND POLICY ROLE THAT THE OTHER ASSOCIATE COMMISSIONERS HAVE. FURTHERMORE, I AM INTERESTED IN THE AOA'S PLANS FOR THE ORGANIZATION AND STAFFING OF THE NEW OFFICE. THESE ARE OBVIOUSLY VERY IMPORTANT ELEMENTS OF THE IMPROVED OAA AND I WOULD LIKE TO KNOW HOW THE COMMISSIONER IS PROGRESSING ON THEM.

THE THIRD AREA WHICH APPEARS TO HAVE BEEN OVERLOOKED IS THE TASK FORCE ON OLDER INDIANS AND THE SPECIAL REPORT ON SERVICES TO OLDER INDIANS. THE LAW REQUIRES THE COMMISSIONER TO ESTABLISH A PERMANENT INTERAGENCY TASK FORCE ON OLDER INDIANS, WHICH WOULD INCLUDE REPRESENTATIVES OF FEDERAL AGENCIES AND DEPARTMENTS WITH AN INTEREST IN OLDER INDIANS. THE OBJECTIVE OF THIS TASK FORCE IS TO DEVELOP FINDINGS AND RECOMMENDATIONS ON THE COORDINATION AND IMPROVEMENT OF SERVICES TO OLDER INDIANS. THE COMMISSIONER IS ALSO DIRECTED TO CONTRACT FOR A STUDY OF THE AVAILABILITY AND QUALITY OF SERVICES TO OLDER INDIANS. TO MY KNOWLEDGE, THIS HAS NOT YET BEEN DONE. IT IS MY HOPE THAT THE COMMISSIONER WILL HAVE SOME POSITIVE NEWS FOR THE COMMITTEE TODAY REGARDING HER TASK FORCE AND STUDY PLANS.

MR. CHAIRMAN, I WOULD LIKE TO MENTION ONE OTHER CONCERN THAT I HAVE REGARDING THE TREATMENT OF OLDER INDIANS BY THE AOA REGULATIONS. I AM EXTREMELY HOPEFUL THAT IN CRAFTING THE FINAL RULEMAKING, THAT THE AOA WILL BE VERY SENSITIVE TO THE RELATIONSHIP THAT WILL BE DEVELOPED BETWEEN STATES AND TRIBES, AND THAT THE ISSUE OF TRIBAL SOVEREIGNTY AND THE HISTORICAL RELATIONSHIP THAT HAS

EXISTED BETWEEN TRIBES AND THE FEDERAL GOVERNMENT WILL BE RESPECTED AND UPHELD.

THE LAST ISSUE ON WHICH I WILL COMMENT RELATES TO AN AMENDMENT THAT I OFFERED ON THE HOUSE FLOOR REGARDING AREA AGENCIES ON AGING AS SINGLE ORGANIZATIONAL UNITS. THIS AMENDMENT, WHICH WAS ENDORSED BY THE NATIONAL ASSOCIATION OF AREA AGENCIES ON AGING, THE AMERICAN ASSOCIATION OF RETIRED PERSONS, THE NATIONAL CAUCUS AND CENTER ON THE BLACK AGED, AND THE NATIONAL ASSOCIATION FOR HISPANIC ELDERLY, WAS AGREED TO BY UNANIMOUS CONSENT IN THE HOUSE AND WAS SUBSEQUENTLY ACCEPTED BY THE SENATE CONFEREES IN THE CONFERENCE COMMITTEE.

THE INTENT OF THIS AMENDMENT, WHICH WAS COSPONSORED BY REPRESENTATIVES KILDEE, ROYBAL, PEPPER, AND BIAGGI, WAS TO ASSURE THAT AN AREA AGENCY ON AGING IS A SEPARATE, IDENTIFIABLE UNIT TO OLDER PERSONS IN NEED OF ASSISTANCE. THE OAA STATUTE STATES THAT AREA AGENCIES ON AGING WILL BE A VISIBLE FOCAL POINT WITHIN THEIR COMMUNITIES TO BEST SERVE THE ELDERLY AND ADVOCATE IN THEIR BEHALF. IT WAS OUR BELIEF THAT WHEN AN AREA AGENCY IS HOUSED WITHIN A LARGER SPONSORING AGENCY, IT SHOULD BE A "SINGLE ORGANIZATIONAL UNIT" WITHIN THAT AGENCY. THIS WILL ASSURE ITS VISIBILITY WITHIN THE COMMUNITY.

THIS AMENDMENT IN NO WAY PROHIBITS THE PLACEMENT OF AN AREA AGENCY ON AGING WITHIN AN UMBRELLA AGENCY, SUCH AS A COUNCIL OF GOVERNMENTS, A REGIONAL PLANNING DISTRICT, OR CITY OR COUNTY GOVERNMENT. THE AMENDMENT WAS OFFERED TO AVOID THE PROBLEMS THAT CAN OCCUR WHEN THE FUNCTIONS OF AN AREA AGENCY ON AGING ARE SPREAD OUT TO A VARIETY OF AGENCIES UNDER A LOCAL GOVERNMENT, FOR EXAMPLE. THIS INTENT IS CLEARLY DISCUSSED IN THE CONFERENCE REPORT WHICH ACCOMPANIED H.R. 1451.

MR. CHAIRMAN, IT WAS NOT THE INTENT OF THE SUPPORTERS OF THIS AMENDMENT TO LEGISLATE WHETHER AREA AGENCIES ON AGING SHOULD OR SHOULD NOT HAVE SEPARATE BOARDS OF DIRECTORS. AND IT WAS NOT OUR INTENT TO HAVE THE COMMISSIONER USE THE REGULATORY PROCESS TO DIRECT STATES OR LOCALITIES AS TO WHETHER THEY SHOULD OR SHOULD NOT FORCE AREA AGENCIES TO HAVE SEPARATE BOARDS. OUR INTENT WAS SIMPLY AS I HAVE STATED IT, AND I WOULD APPRECIATE HAVING THE COMMISSIONER'S COMMENTS ON THIS SUBJECT FOR THE RECORD.

CHAIRMAN DOWNEY, IT HAS BEEN A NEW AND REWARDING EXPERIENCE TO COME BEFORE YOU AND YOUR DISTINGUISHED SUBCOMMITTEE TODAY; I HOPE THAT YOU AND I CAN CONTINUE TO WORK TOGETHER ON THE OLDER AMERICANS ACT AS WELL AS OTHER AREAS UNDER THE JURISDICTION OF MY SUBCOMMITTEE ON HOUSING AND CONSUMER INTERESTS. THANK YOU AGAIN FOR INVITING ME.

Mr. DOWNEY. Ms. SNOWE, do you have any questions for Congressman Bonker?

Ms. SNOWE. Yes, thank you, Mr. Chairman.

Congressman Bonker, I think you have raised several good questions that we will also ask of the Commissioner. Some of the issues that you present have had not been addressed, such as establishing the task force concerning the Indians and so forth. You also stress in your statement the need for improved oversight of the States by AOA in regard to whether or not State long-term care ombudsman programs operate consistently with the Older Americans Act requirements.

To what extent do you believe the AOA should oversee the long-term care ombudsman programs and should any limitations be placed on that agency's right for oversight?

Mr. BONKER. I am hoping that the agency will be far more aggressive in its oversight function. I don't really fault them for a lack of commitment in this regard, but the ombudsman program has been around for a decade and it is still spotty. It is still not a viable tool for those who have relatives in these institutions.

I have to be honest with you, even though I have had a father and a grandmother in the institution, and I have been serving on this committee, I can tell you that I was unaware that Washington State had such a program.

Now, if an informed member of Congress is unaware, then the citizens at large certainly are not aware, and as a result, it has very little value. I think that every nursing home ought to post an information—or make it available to relatives whenever a person becomes a resident so they know they have access to that kind of help in case problems arise. Otherwise, they don't know where to turn. You know where they turn eventually; they turn to the Congressman's office for assistance.

But an ombudsman program, as Congress has intended, should be well-known, viable, accessible to all the people who have to deal with these institutions, so there is an ultimate appeal, if you will, if things go wrong.

Incidentally, these recommendations that I have put forth by way of amendments to the Reauthorization Act came from the Institute of Medicine, which is part of the National Academy of Science, and they recommend the major improvements, including increased funding for States, which we proposed, but which was not fully funded.

So these recommendations come as a result of studies and analyses and recommendations and they ought to be adhered to by the Executive Branch.

Ms. SNOWE. I think you raise a valid point. We have heard these complaints about the ombudsman program in the past—that it is not a highly visible program in many States. So, in fact, either the nursing home patients or the families of those parents aren't aware of where they can go to raise certain problems.

I notice in your statement that you have concerns about the changes in regulations concerning the confidentiality of complainants. Are you proposing some different language than is in the regulations as to who would have access to those files?

Mr. BONKER. I am not proposing specific language, but I think it is a matter that ought to be pursued by this committee, especially in view of the proposed rules that you will be reviewing.

Ms. SNOWE. Certainly other witnesses who will be following you have expressed concerns about the changes in regulations as well, so we will be exploring that issue further.

Again, thank you, Congressman.

Mr. BONKER. I think that would be timely.

Mr. DOWNEY. Congresswoman Saiki.

Mrs. SAIKI. No questions, Mr. Chairman.

Mr. DOWNEY. Thank you, Don.

Mr. BONKER. Thank you, Mr. Chairman.

Mr. DOWNEY. The committee will next hear from Commissioner Carol Fraser Fisk, Administration on Aging.

Commissioner.

STATEMENT OF CAROL FRASER FISK, COMMISSIONER, ADMINISTRATION ON AGING; ACCOMPANIED BY FREDERICK LUHMANN, DIRECTOR, DIVISION OF PROGRAM MANAGEMENT, ADMINISTRATION ON AGING; AND CHARLES E. WELLS, DEPUTY COMMISSIONER ON AGING, ADMINISTRATION ON AGING

Ms. FISK. Good morning.

Mr. DOWNEY. Good morning. Your statement, Commissioner, will be entered into the record in its entirety. If you choose to read it, that would be fine; if you want to summarize it, that will also be fine.

Ms. FISK. Thank you, Mr. Chairman. I do have a brief summary if I could. I want to add my words of commendation to all of you for this opportunity to look closely at the Older Americans Act and the proposed regulations.

I have, as you have said, submitted written testimony for the record and will just briefly summarize my comments.

With me this morning are Deputy Commissioner Charles Wells, to my left, and Dr. Frederick Luhmann, who is the Director of the Division of Program Management in our Office of State and Tribal Programs.

On behalf of the Secretary, the Administration on Aging and older persons throughout the country, I want to congratulate the Congress for its passage of Public Law 100-175, the Older Americans Act Amendments of 1987. This legislation has added timely and important amendments to the act.

Through the 1987 amendments, Congress has indeed done much to strengthen the Older Americans Act's support of programs and activities that respond to the complex and changing environment which is emerging as America's society ages.

The act continues its strong emphasis on collaboration between public, private and voluntary sector organizations, to assure that every community in the nation provides an opportunity for individuals to live and mature with dignity and independence.

In reauthorizing the act, Congress has reaffirmed the expectation that OAA, State Agencies on Aging, area Agencies on Aging and Tribal organizations provide effective leadership at their respective

levels and work to establish strong partnerships to assure that the nation is responding to the challenge of an aging society.

By Congress' action, it has also done much to reinforce the role of State Agencies on Aging as the leader in the development of a comprehensive and effective system for older persons at the community level throughout each State. Through these new amendments, you have also enhanced the role of area Agencies on Aging as the leader and catalyst in developing community-based systems of services for older persons in every community in their planning and service area. In addition, you have focused greater attention on the needs of native American elders.

AOA has moved quickly, I am proud to say, to implement the provisions of the 1987 amendments. We have published the proposed regulations in the Federal Register. These proposed regulations are intended to underscore provisions in the act or in current regulations.

Virtually all of the content of current regulations were retained. We have adhered to this Administration's philosophy of reducing regulatory burdens as much as possible in providing States and area Agencies on Aging and tribal leaders with greater flexibility to respond to the needs of their respective populations.

It is my belief that these regulations represent another important milestone in our national effort to make each and every community in this nation a good place to live and to mature. The proposed rules identify distinct and important roles for State agencies, area agencies and service providers.

Agencies and organizations at each of these three levels have vital roles to play as we work to prepare for the graying of America. The most important single contribution of these proposed rules is to clarify these important and distinct roles and the strong partnership that must exist again among these players.

Again, Mr. Chairman, I want to thank you for this opportunity to testify. In close collaboration with the State agencies, AOA is moving ahead as expeditiously as possible to completely implement all provisions in the reauthorized act.

I want to assure you of the commitment of the President and the Secretary to this law and to its successful implementation. You also have my personal pledge and support of this act. We will work with States, with area agencies, with service providers and with tribal leaders again to try to make sure that each and every community in this nation is a good place to live and to mature.

Now I would be glad to try to respond to any questions you or members of the Congress might have, Mr. Chairman.

[The prepared statement of Ms. Fisk follows:]

PREPARED STATEMENT OF CAROL FRASER FISK

Mr. Chairman, I want to thank you and the members of your subcommittee for this opportunity to provide testimony here today. On behalf of the Secretary, the Administration on Aging and older persons throughout the country, I also want to congratulate the Congress for its passage of P.L. 100-175, the Older Americans Act Amendments of 1987. This legislation has added timely and important amendments to the Act.

Through the 1987 amendments, the Congress has done much to strengthen the Older Americans Act's support of programs and activities that respond to the complex and changing environment which is emerging as American society ages. The Act continues its strong emphasis on collaboration between public, private and voluntary sector organizations to ensure that every community in this nation provides an opportunity for individuals to live and mature with dignity and independence.

The reauthorized Act reaffirms expectations of the Congress and the Administration that AoA, State Agencies on Aging and Area Agencies on Aging function in partnership in a way that assures each will

provide effective leadership at their respective levels and work to establish strong partnerships with other public, private and voluntary sector organizations to assure that the nation is responding to the challenge of an aging society. Congress has done much to reinforce the role of State Agencies on Aging as the leader in the development of comprehensive and effective systems for older persons at the community level throughout the State. Through these new amendments, you have also enhanced the role of the Area Agencies on Aging as the leader and catalyst in developing community-based systems of services for older persons in every community in their planning and service area.

The Department has moved quickly to implement the provisions of the 1987 amendments. We have acted to implement the Part D, in-home services program and have asked the States to amend their State plans to make provision for these services. To date, 36 States have done so. We have published in the Federal Register, within the timeframe established by the Congress, a Notice of Proposed Rulemaking (NPRM) for supportive and nutrition services grants for State and community programs on aging (Title III) and for Indian tribes and organizations serving older Hawaiians (Title VI). Nearly 2,000 copies of the Federal Register notice have been disseminated to agencies, organizations and individuals with an interest in AoA supported programs. We provided a 60 day comment period on the proposed regulations in order to give maximum

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opportunity for public comment. The comment period will end on May 31. Although the statutory deadline for issuance of final regulations is only 30 days after the close of the comment period, we will make every effort to comply with the deadline for publication of the final regulations.

In developing the proposed regulations, the framework was changed to improve their logic and readability. Changes were primarily intended to clarify provisions in the Act or in current regulations. Virtually all of the content of the current regulations was retained. We adhered to the Administration's principle of reducing regulatory burdens as much as possible and providing States and Area Agencies with greater flexibility to respond to the needs of their respective populations. The changes fell into three clusters:

- 1) Changes to reaffirm the intent of the Older Americans Act.
- 2) Changes to implement provision of the 1987 reauthorization of the Act.
- 3) Changes to make technical corrections in current regulations.

Among the more important changes or additions to the regulations are the following:

- 1) Language is included to echo Congressional emphasis on the need for States to target efforts towards older individuals with the greatest social and economic needs, with particular emphasis on low income minority elderly persons.
- 2) A statement is included on the mission of the State Agency in order to emphasize Congressional interest in the State's leadership role in fostering the development of comprehensive and coordinated systems at the community level throughout the State. The role of the State Agency in designating Area Agencies on Aging is also clarified.
- 3) Language is included to emphasize the State Agency's role as the leader and advocate for the elderly within the State as Congress mandated. We also make clear that the State Agency is responsible for assuring that all of the requirements of the Act for the ombudsman program are met regardless of the State legislation or source of funding for the ombudsman program.
- 4) The role of the State Agency in developing and enforcing policies governing all aspects of the operation of Older Americans Act programs is clarified.

- 5) A new State plan assurance is included concerning the State Agency's responsibilities for data collection from Area Agencies.
- 6) Language has been added to enable States to withdraw Area Agency designation where the activity of such agency would create a conflict of interest in the conduct of its statutory mission.
- 7) The Commissioner is required by September 30, 1989, to submit a report to the Congress summarizing in detail for each State the results of State evaluations of the unmet need for supportive services, nutrition services, and multipurpose senior services. As required by Congress, a regulation is included to assure that the evaluations from the States include objective and statistical data.
- 8) A mission statement of the Area Agencies is included to reaffirm Congressional intent concerning the fundamental responsibility of the Area Agency in providing leadership, planning and development throughout the planning and service area on all aging issues. In addition, language

is added which clarifies the mission of the Area Agency in developing, comprehensive systems for older persons in communities throughout the planning and service area. The elements which comprise such systems are also spelled out in the form of a goal statement in regulations.

- 9) In response to Congressional action, AoA has included language to clarify the responsibility of the Area Agency to designate community focal points, giving special consideration to designating multipurpose senior centers as such focal points. The regulations make clear that the Area Agency is to work with community leaders in the planning and service area in designating these focal points which, as the Act states, should be facilities established to encourage the maximum collocation and coordination of services for older persons.
- 10) In conformance with law, language is included to clarify that the Area Agency may be placed within an "umbrella" agency, such as a city or county human services department, council of governments, regional planning commission, or regional planning district. If included under such a multipurpose agency, the Area Agency must remain an identifiable unit that functions only for the purpose of serving as the Area Agency on Aging.

- 11) Additional language on the advocacy responsibilities of Area Agencies is included to reinforce the principle that the mission of the Area Agency is to provide leadership in coordinating plans and activities with other organizations in the planning and service area concerned with the well-being of older persons. The revised policy language reflects the particular concern of Congress that the Area Agency assure that services provided throughout the planning and service area are delivered by competent service providers at the community level and be particularly structured to meet the needs of low income and minority older persons.
- 12) A provision is included that reaffirms expectations that Area Agencies and service providers give priority to providing services to frail, homebound or isolated older persons.
- 13) Consistent with provisions in the new amendments, the regulations require an Area Agency to obtain from a service provider an assurance that its services will contribute to the goal of developing responsive community based systems. The service provider must also assure the timely submission of statistical and other information necessary for the Area Agency to plan, coordinate and evaluate its programs, and meet reporting requirements of the State.

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- 14) A new Part 1328, "Grants For Supportive And Nutritional Services To Older Hawaiian Natives," is included. The regulations for this Part are nearly identical to the current regulations in Part 1328 for Grants To Indian Tribes because the amendments to the Act creating the program for older Hawaiian Natives are similar to the existing program for American Indian elders.

It is my belief that these regulations represent another important milestone in our efforts to make each and every community in this nation a good place in which to live and mature. These proposed rules identify distinct and important roles for State Agencies, Area Agencies and service providers. Agencies and organizations at each of these three levels have vital roles to play as we work to prepare for the graying of America. The most important single contribution of these proposed rules is to clarify these important and distinct roles and the partnerships that must exist among these players.

Again, Mr. Chairman, I want to thank you for this opportunity to provide testimony. In close collaboration with the State Agencies on Aging, AoA is moving ahead as expeditiously as possible to completely implement all provisions in the reauthorized Act. I will gladly respond to your questions.

Mr. DOWNEY. Thank you, Commissioner.

We sent you a letter, I believe, on April 22nd, where we submitted a number of questions to you.

Ms. FISK. Yes, you did.

Mr. DOWNEY. I want to go over some of them orally with you and those that I don't get to, if you would submit the responses to the record, I would really appreciate that.

Ms. FISK. I would be happy to do so.

Mr. DOWNEY. The first has to do with the questions of advocacy. This is always a sensitive subject, but I know that the intent of the law, at least from my perspective, was that we allow advocates to take on the establishment and make sure that the law reflected that.

In proposed regulations, I believe, specifically Section 1321.61, the proposed regulations do develop workable guidelines to define advocacy and I support this. However, each section on advocacy closes with the same paragraph, which seems in conflict with congressional intent, and I will quote you the paragraph:

"No requirements of this section shall be deemed to supersede statutory or other regulatory restrictions regarding lobbying or political advocacy with Federal funds."

Now, this is the same, in fact, I believe, the same language retained from previous regulations, and in light of the stated congressional intent in the new amendments, is this old language retained in the new regulations and, if it is, would you consider deleting it before they become final?

Ms. FISK. Our proposal is, as you have suggested, to retain the old language. We have had comments, including your own, asking us to take a second look at this provision and we have clarified, through research, that the limitations have to be focused on advocacy only at the Federal level. So we are looking again at this provision and appreciate your drawing it to our attention.

Mr. DOWNEY. I appreciate that.

Congressman Bonker testified before you, you heard, and had some questions about the ombudsman program, indeed, the fact that in the State of Washington, for at least his perspective, he wasn't aware of the program and he is a member of the subcommittee and a member of Congress.

I think that says a lot about the ability of people to appreciate what is there for them. Are you satisfied that the ombudsman program that has been established and ongoing for more than 10 years is working, that people who may need the services of an ombudsman are aware that they are there? If not, what can we look forward to from the Office of Aging to improve the situation?

Ms. FISK. I am very pleased with the amendments that Congress has passed in regard to the ombudsman program because you have made it very clear that you expect this to be a strong State program, a program that has the full commitment not only of the Administration on Aging, but of the State director and the State Office on Aging, ergo also the governor. We are very pleased with that reaffirmation and the strengthening of that emphasis on State responsibility.

I did hear the Congressman's concerns and you have repeated them in terms of the visibility of this program. We also hear con-

cerns related to training and training of ombudsmen was underscored in the reauthorization also.

We have now under consideration applications submitted under our discretionary program to focus and center on ombudsmen that would not only help in the area of training, but I believe could help focus on the issue of visibility. I am never satisfied that our programs are visible enough. The volume of mail that I receive in my office and the volume of mail that you receive indicate that older people and their family members do not know where to turn. They don't know that there are States and area agencies in their home environment who can help them. So, no, I am never satisfied in that regard.

We have prepared and disseminated through States and area agencies a guide, a generic guide to the aging network that we have made available for people to reprint as one step in trying to increase visibility.

We have also recently released to the State Offices on Aging a television and radio public service announcement that a State and customize or a local community area agency can adapt for its own use. Those are some of the steps that we have taken to try and make these excellent resources more visible. We will continue to do more.

Mr. DOWNEY. I am happy to hear that.

Can you give us—and I realize this may be difficult for you to answer off the top of your head, but can you tell us some States or some area agencies that you think do a really good job in this respect that we could look to as models?

Ms. FISK. I guess I would like to go and think about that and provide that for the record. The first that comes to mind is that the State of New Jersey has a very visible program and a very strong outreach effort. That effort is a very clear effort to make it visible to older people and their family members.

The city of New York has a fine outreach and information and referral service. I would like to look further and provide some more information for the record on that.

Mr. DOWNEY. I would like you to also, if you could think of it, to provide us what you think might be the criteria for what works and what doesn't work.

In my Subcommittee on the Public Assistance and Unemployment Compensation in the Ways and Means Committee, we are very concerned about child-support enforcement, and about foster care. We are thinking about providing grades to various States in terms of their performance. We find that to be a fairly useful tool in focusing people's minds when you are going to grade their work and make it publicly available.

That might be something that you would want to consider and also might be something that our subcommittee might want to consider as well in terms of the spurring—aside from just providing money and direction, but advertising the people who are doing well and also trying to send a message to those who aren't doing well.

Mr. DOWNEY. Ms. Snowe, do you have some questions?

Ms. SNOWE. Yes, I do, thank you, Mr. Chairman.

Commissioner Fisk, can you explain why the regulations talk about changing the relationship between the area agency and the

State agency so that the area agencies serve as agents of the State units in building comprehensive assistance for older people throughout the State? Does that not create sort of a negative relationship, or change the existing relationship between the area agencies and the State units? Do you sense concerns about that proposed change?

Ms. FISK. Yes, I have, and I think they are unfounded. I believe that we have in this law—and Congress has created since the passage in 1965—a very strong partnership. Congress has reaffirmed in the reauthorization last year your expectation that States provide the leadership for building a statewide system of community services.

We then go further in implementing and say that the law says that States will designate area agencies to do this job with them. We are responding to requests from State offices, as well as from area agencies, in trying to give them greater leverage and greater strength in their local community to do that very important job.

By accepting designation of being an area agency, an area agency accepts that responsibility, just as the State accepts that responsibility to serve as the community systems building leader throughout the entire State. So I don't think that is a negative. In fact, I think that it builds a stronger bond and I think that it makes it very clear that the area agency has the power of the State behind it in the work that it is doing throughout its planning and service area to help every community in that planning and service area respond to the challenge of its older population.

Ms. SNOWE. I have heard the concern that area agencies might be viewed more as line staff for the State units.

Ms. FISK. It could not be. That would be in violation of the law because the law is very clearly when it says that that is not what your intent is, nor would we want to violate that intent.

Our intent is to strengthen the programmatic hand, if you will, of the area agency so that it has the opportunity and the tools to do the better job at the community level throughout the planning and service area.

Ms. SNOWE. So your suggestion is that the change in the regulations is to delineate more clearly the relationship that exists between the area agencies and that they have the backing of the State agency as well?

Ms. FISK. Yes.

Ms. SNOWE. Is it necessary? What happened that would precipitate this change?

Ms. FISK. Our conversations with State offices and with some area agencies have indicated that this was something that they desired and we are certainly eager in this comment period to get some reaction to it.

Ms. SNOWE. What about the State plan? The State plan was devised from what came out of the area agency. Is that going to change at all with respect to these proposed changes?

Ms. FISK. I would see no change in that relationship, no.

Ms. SNOWE. On direct services—I was noticing in your proposed regulations that you broaden the definition of "direct services" which would be disallowed. That could have an impact on the State of Maine.

Again, why was it necessary to broaden the definition of direct services?

Ms. FISK. In conversation with, again, States, area agencies and direct service providers, we were encouraged to clarify the important role that States and area agencies have in providing leadership and in serving as catalysts and brokers, particularly the role that the area agency has to provide in that regard.

We have attempted a definition, and in looking at it again yesterday, realized that it is not as complete and as clear as we thought it might be and we do intend to look at it again, but our intent is very clear. That is, to reaffirm and to clarify and to underscore congressional intent that States and area agencies fulfill that systems building role, serve as catalysts, serve as brokers to develop the community system Statewide and that that effort must include direct provision of services by individuals and organizations who are so charged.

It is a conscious decision that the State needs to make and can make and still will make in regard to how the area agency is involved in direct service provision.

Ms. SNOWE. So you are intending to clarify this definition?

Ms. FISK. Yes, we do intend to.

Ms. SNOWE. Add exclusions or so on?

Ms. FISK. To add references to service providers, yes.

Ms. SNOWE. Okay. I think this is necessary because I think the definition, as it stands, is too broad.

One other area in the proposed regulations suggests requiring voluntary contributions for all Title III services. That is a departure from existing law where voluntary contributions only apply to Title III nutrition services.

What is your reason for making that proposed change?

Ms. FISK. Our practice has always been to allow voluntary contributions for all components under Title III, and we are continuing that opportunity. We have no intent of mandating that people make contributions, but rather, we offer the opportunity for older people who receive services to voluntarily provide a contribution if they wish.

We are very proud of the record that we have had over the last several years and that older people have had in terms of making contributions, both under III(c) and III(b), but we are also very mindful and very sensitive to the fact that we do not want any older person to turn away from this program because they feel undue pressure. I think States and area agencies, I know, are equally as sensitive and have implemented this contribution provision with extensive sensitivity.

We do also go into, as the law now requires, further slight reference to the needs for service providers to make sure that they are providing that opportunity for contributions. But there is very—I see no change from past practice here.

Ms. SNOWE. Well, it was just applied to nutrition services?

Ms. FISK. No, we have—over the history of this act, we have always invited voluntary contributions in all portions of Title III.

Ms. SNOWE. Yes, but the difference now in these regulations is that you are requiring voluntary contributions for all services—

Ms. FISK. Requiring that the option be provided.

Ms. SNOWE. That the option be provided.

Ms. FISK. And that is the same as how this program has been operated since the beginning of time. We provide an opportunity under all program components for older people to make a contribution.

Ms. SNOWE. So it would be up to whom, the area agencies, to decide whether or not the option would be provided? I don't see any options there other than requiring voluntary contributions. Although it is appropriate, we have had problems in the past with requiring voluntary contributions because of the pressure that has been applied to senior citizens feeling compelled, to contribute, even if they are in a situation where they could not.

Ms. FISK. I have heard anecdotal information that would justify what you say. We have given technical assistance materials to States for use with area agencies that we hope would provide the best practices that one could use in encouraging those kinds of contributions.

Ms. SNOWE. Congressman Bonker raised in his testimony the concern about the Interagency Task Force on Older Indians, which heretofore has not been established.

Ms. FISK. That is correct.

Ms. SNOWE. Can you address the reason why it has not yet been created?

Ms. FISK. I have obtained the help of a special advisor on Native American elderly programs, who is working with me right now, as I said, my special advisor. He is on loan to us from the Indian Health Service, Dr. J. T. Garrett, who is the senior member of the Indian Health Service and I am a member of the Commission Corps.

Dr. Garrett and I are working together to outline and to present to Secretary Boland suggestions concerning the composition of that task force. We expect to move promptly in that regard.

I might note that Dr. Garrett has been particularly helpful to us in raising our sensitivity to Native American peoples. He is a member of the Eastern Band of the Cherokee Tribe based in North Carolina, and I would welcome the opportunity to introduce you to him, if I might ask him to stand. J. T.

We have greatly benefited from his services over the last month.

Ms. SNOWE. Finally, there have been some staffing shortages at your agency. Can you tell the subcommittee what have been the nature of these shortages and whether or not you plan to remedy the problem in the future?

Ms. FISK. I can confidently say that the staff that I have are staff that are fully utilized. We make full use of the staff allotment that is given to us.

Ms. SNOWE. You do have shortages?

Ms. FISK. Given the work assignments that we have, I think we would all, in any agency, be eager to have additional individuals who could work for us and with us on behalf of older individuals. I think you would find that any State director and any area agency director would also feel the same way.

Ms. SNOWE. In what areas do you have staffing shortages at this point?

Ms. FISK. As I said, I think we are covering all of our assignments under the Older Americans Act and we are endeavoring to do that with the staff that we have on board.

Ms. SNOWE. Thank you.

Mr. DOWNEY. Before I recognize Congresswoman Saiki, I want to just follow up on what Congresswoman Snowe was asking you about nutrition areas and service contributions.

Under Section 1321.67, service contributions, specifically under paragraph 5, do we interpret that particular portion of the regulations to mean that all voluntary contributions may be used only to expand congregate or home-delivered meals?

Ms. FISK. We have repeated the same language that we had in previous regulations and have always asked that contributions coming from any particular component are used to increase services in that component. So, for example, if contributions are from the congregate meal program, we ask that those contributions are used to expand meals delivered in the congregate center. That is continuation of previous practice and regulation.

Mr. DOWNEY. Thank you.

Congresswoman Saiki.

Mrs. SAIKI. Just one short question.

The regulations do not address the position of associate Ms. for the American Indian, Alaskan Native and the Hawaiian Native aging area. I think it is very critical to define how this part of the program is going to be implemented and whether you intend to perhaps later define more critically the roles and responsibilities of the associate Ms. as it was suggested by the Congress.

Ms. FISK. It is not our usual practice to provide in regulation information regarding staff positions in the Administration on Aging.

Mrs. SAIKI. How about a definition so far as the law is concerned?

Ms. FISK. We use internal administrative procedures and the law, I believe, is very clear to then develop the appropriate position description and make recommendation to the Secretary concerning the employment of that individual. It is part of our management and organizational behavior to handle those things that way and we have never before covered staffing of our own agency in those regulations.

I can assure you that we have every intent of hiring a fully qualified individual to fill that position.

Mrs. SAIKI. That is sort of a foggy area that keeps being used as a buck that is passed back and forth as to what is the status of this person, what are the responsibilities, and you may handle it internally as staffing, but insofar as the rule is concerned, recognition of this position, I think, is very important.

Ms. FISK. I understand the point that you are making and I would like the opportunity to study that further. We are deeply committed to the concerns that Congress has raised regarding Native American peoples, Indian, Hawaiian, Alaskan Natives.

As I have mentioned to you, we have added on loan a member to our team who is helping us extensively in that area. Whether we should pursue that further in regulations, I would welcome the opportunity to look at more closely, if I might, please.

Mrs. SAIKI. I would personally appreciate it because this legislation is certainly a first in many areas, in many ways, and especially the recognition of the Native Hawaiian in this bill is a great boost to the morale of all of us who have labored for many years to try to call attention to the fact that the Native Hawaiians do suffer from illnesses and have a shorter lifespan and have significant areas of health concerns that we have not been able to address.

That is the reason I am especially sensitive that the program work and that our staff people and the area staff and the State organization fully understand that your level of direction is a direct one. It is a communication link that is going to be there.

Ms. FISK. I appreciate that. Thank you.

Mrs. SAIKI. Thank you, Mr. Chairman.

Mr. DOWNEY. Let me come back to a couple more questions before we let you go, Ms. Fisk.

One is that there have been a number of concerns that have been raised about the mission statement for State and area agencies on Aging which appear in the proposed regulations. Could you provide us with the statutory basis and the other rationale for this provision?

Ms. FISK. The mission statements for State and area agencies are drawn from Sections 305, 306 and 307 of the law. We have pulled together in those statements language that comes not only from those sections of the law, but committee discussions throughout the various reauthorizations of this act.

We have done this on the request of both some States and some area agencies who felt the need to have in law language that would better clarify for themselves, but more importantly, for others in the community who do not understand your expectations of them. We have taken the language that you have developed in the law and pulled it from those various pieces and tried to provide a succinct one-paragraph mission statement for both entities.

Mr. DOWNEY. One of the major new proposals in P.L. 100-175 is the new Title III D providing home services for the frail elderly. Could you discuss those implementing provisions of III D which appear in the proposed regulations.

Ms. FISK. We felt that the law was eminently clear and so we have not written in regulation any specific language related to III D. The law is extensive and the law is clear. The law provides direction to State offices.

We have received assurances and State plan amendments from 53 States and territories thus far and have four territories remaining who have not yet received their III D funds for this year, but at this point, most of the money has been allocated to the States and they are working to implement that new provision, I might say, with a great deal of enthusiasm. They are very pleased with that.

Mr. DOWNEY. Good.

In Section 1321.1(c), if you could take a look at that and explain that the new language which says that the area agencies are to "serve as the State agency's agent in building comprehensive systems for older people throughout the State."

Ms. FISK. Yes. We have reflected in that language our desire to strengthen the programmatic bond between the State Office on Aging and the Area Agency of Aging, and we have come to do this

as a result of dialogue with a whole variety of individuals and organizations.

The Congress is very clear in your mandate that the State provide leadership for building a statewide system and you give the States the opportunity to designate an area agency to work within that regard. This language attempts to further strengthen that bond.

Mr. DOWNEY. Congresswoman Snowe.

Ms. SNOWE. One other question, Mr. Chairman, on the mission statement. In talking about the proposed mission statement to one of our area agency directors in the State of Maine, he suggested that this proposed regulation goes beyond clarification, that, in fact, it intends to limit the area agencies' activities.

For example, in our State, in one area, they conduct a nutrition program jointly with a Head Start Program and obtain support for the nutrition program. Would that be an activity that would be disallowed?

Ms. FISK. Without knowing the exact operation, I wouldn't want to make a policy statement about that here in this environment. In fact, that mission statement reinforces what the law says in those three sections, underscores, attempts to underline and put exclamation points behind the critical role that our nation expects States, area agencies and, in fact, AOA to play in marshaling all forces at the community level to respond to older people today and in the future. The kind of intergenerational programming that you have just spoken about is the kind of thing we try to encourage, but without knowing any more details about that, I think I would be remiss if I commented about that one site.

Ms. SNOWE. They joined the nutrition program with other programs and it is a source of money for the nutrition program. I think that the key issue here is whether or not the requirement in the mission statement is a limitation on their activities.

Ms. FISK. I would not see it as such as all.

Ms. SNOWE. Will there be changes as a result of the mission statement on the activities they are engaged in at this nutrition program? Obviously, this mission statement has an effect on their creativity or their innovation for that matter.

Ms. FISK. I would hope that it has no negative effect. I would hope that it encourages those area agencies who have not seen the breadth of their responsibility as expansively as Congress saw it, to step up their efforts.

I would hope that their mission—they will see their mission well beyond the provision of services which, if the State has approved, that is certainly part of their mission, but we, as a country, are dependent upon this network and looking to AOA, the State units and area agencies and the service providers to bring together a system that makes sense for older people.

My mail and your mail indicates that in some areas we have great success and in other areas, we have a way to go. We think these regulations put some needed force behind all of us to do a better job in that regard.

Ms. SNOWE. The new regulations state that area agencies can only engage solely in activities consistent with the area agency's

statutory mission. So, in effect, any kind of innovative partnership could be disallowed under this new regulation.

Ms. FISK. I don't understand your question on how that would—

Ms. SNOWE. It could. If the nutrition joins with Headstart and a sheltered workshop then it no longer would be under this mission statement because it says "solely in activities"—"engaged solely in activities consistent with the area agency's statutory mission."

Ms. FISK. Their statutory mission comes from the approval of their plan by the State Office on Aging. They then go forth to implement that plan. That is the concept of statutory mission. I would be hard-pressed to think of a State that would be discouraging the kind of behavior that you have discussed. In fact, that is the very kind of thing we want to encourage more to get into.

They would be wanting to operate within the guidance of their approved plan.

Ms. SNOWE. That is an important clarification of that regulation.

Ms. FISK. I am sorry; I misunderstood you.

Ms. SNOWE. Thank you.

Mr. DOWNEY. Thank you, Commissioner, for your testimony, and if we could ask you to respond to the written questions before May 15th.

Ms. FISK. We would be happy to do so. Thank you, again.

Mr. DOWNEY. Thank you, Commissioner, thank you.

[The questions and answers follow:]

4(a) AGENT OF THE STATE

QUESTION In Section 1321.1(c), can you explain the new language which says that the area agencies are to "Serve as its (the state agency) agent in building comprehensive systems for older people throughout the state."

ANSWER Sections 305 and 307 of the Act clearly assign to the State Agency on Aging the overall responsibility to assure that comprehensive community-based systems of services for all older persons are developed or enhanced throughout the State. Each Area Agency on Aging is designated by the State Agency to join with the State Agency in carrying out this statutory systems development mission for the specific planning and service area which the State Agency entrusts to the Area Agency for this purpose. It is in this sense of the term that the Area Agency is an "agent" of the State Agency.

The State Agency in its State Plan must provide to the Administration on Aging a wide range of assurances with regard to the manner in which Older Americans Act programs are carried out throughout the State, many of which relate to the manner in which Area Agencies perform their responsibilities. It is in the exercise of its statutory mission under the Older Americans Act that the Area Agency functions as the agent of the State Agency. The term is not intended for example to connote that the State Agency would be legally liable for a law suit brought against an Area Agency.

In summary, the Area Agencies are referred to as agents of the State Agency because:

a. The State Agency designates Area Agencies for purposes of the Older Americans Act. (While an agency may already exist for other purposes prior to its designation by the State Agency the fact of designation and the acceptance of that designation as an Area Agency imposes a responsibility to fully comply with all provisions of the Act and the statutory mission of an Area Agency.)

b. The State Agency determines the duration and content of Area Plans, approves Area Plans, awards funds to Area Agencies, and monitors the performance of Area Agencies.

c. The State Agency establishes administrative and policy guidance for the operation of Area Agencies, including requirements for reporting by Area Agencies to the State Agency.

d. The State Agency has the authority to terminate the designation of an Area Agency and to designate another agency in its place.

4(e) FUNCTIONING ONLY AS AN AREA AGENCY

QUESTION Under Section 321.35 dealing with the withdrawal of area agency designation under (4) can you more clearly define what is meant by "functioning only" as an area agency on aging? What specifically prompted this language?

ANSWER Section 1321.35 uses the term "functioning only" as an Area Agency in the sense that section 305(c) of the Act and the accompanying legislative history to the 1987 Amendments indicate that Area Agencies are to be constituted either as a separate agency whose sole purpose is be an Area Agency or as a separate organizational unit within a multipurpose agency which engages only in Area Agency functions.

Since the Act requires that an Area Agency engage

only in those activities which are consistent with its statutory mission, it follows, when an Area Agency fails to act in this manner, that the State Agency must take appropriate action. In the extreme instance, this may involve withdrawal of the agency's designation as an Area Agency.

4(f) MAJOR NEW RESPONSIBILITIES AND PROGRAM DEVELOPMENT

QUESTION Under the area agency mission statement, 13231.53, there is language which says that area agencies on aging are recognized as leaders "on behalf of all older persons in the planning and service area no matter what their income." It goes on to say that the area agency is to assume a number of new functions to help in the development or enhancement of services for these older persons.

In light of fiscal realities, why is AoA proposing such a potentially major increase in the responsibilities of area agencies?

Why are these same regulations proposing a deletion of current regulations which allowed area agencies to use Title III supportive service funds for program development? Do you believe that the increase in the administrative allowance for AAAs is sufficient to absorb funding for program development?

ANSWER Section 1321.53 does not propose to increase the responsibilities of Area Agencies on Aging. The proposed regulations, however, do reaffirm Congressional intent concerning the responsibilities of Area Agencies to provide leadership on aging issues in the planning and service area. Language in this section represents a clear bringing together in one statement of the overall statutory responsibilities of Area Agencies. The Act makes clear the expectation that Area Agencies are to carry out a range of activities which increase the capacity and foster the development or enhancement of comprehensive and coordinated community-based systems of services for older persons. The regulations spell out the characteristics or elements that such a comprehensive and coordinated service system should exhibit.

The preamble to the proposed regulations explains that program development and coordination would no longer be permitted as a cost of supportive services because the 987 Amendments both raised to 10 percent the amount of Title II funds which may be used for Area Plan administration and because the 10 percent extends to the new parts of the Act, such as Part D.

4(f) MAJOR NEW RESPONSIBILITIES AND PROGRAM DEVELOPMENT (CONT.)

After 15 years of existence, we believe that Area Agencies should have established themselves with the public and private leadership in their planning and service areas to the extent that local resources should be made available to offset some of the expenses of the operation of the Area Agency. Federal Title III funds can not be relied on indefinitely as the principal source of support for Area Agency activities. In a sample of States which we surveyed, we found that about half of them do not permit administrative expenses of Area Agencies including expenditures for program development and coordination to exceed the then 8 1/2% (now 10%) maximum. Area Agencies in these States are expected to carry out their full mission within the limits of the funds which they receive for Area Plan administration or other resources which they generate. Additionally, any services dollars used beyond the ceiling for administration, including program development have the effect of reducing the Title III funds which are available for immediately needed services for older persons.

4(g) MEANS TEST

QUESTION Under section 1321.61, advocacy responsibilities of area agencies, included is language which says "The area agency may not permit a grantee or contractor under this part to employ a means test." What prompted this language? Is it based in any way on current practices?

ANSWER The language in the proposed regulations merely reiterates a long-standing prohibition on the use of a means test for services provided under Title III of the Older Americans Act. Section 1321.69(b) of the current regulations contain a similar prohibition. The Older Americans Act history has always prohibited the use of a means test. In conjunction with the 1987 Amendments, the Administration proposed the use of a "cost-sharing" approach to services; but the Congress did not accept this proposal.

5(a) HOME DELIVERED MEALS

QUESTION In the area of nutrition services:

(a) Why was the section on home delivered nutrition services deleted from the new regulations?

ANSWER We propose to delete section 1321.71 of the current regulations because the provisions of the Act in the area of home-delivered meals are clear. We do not believe additional Federal regulations are necessary. However, some of the items in current regulations may properly be dealt with in State policies, as appropriate.

6(a) TARGETING

QUESTION In the area of legal services and assistance:

(a) Is it your expectation and hope that the expanded language with respect to the intrastate funding formula and what we refer to as "targeting" will lead to greater services for those elderly in the greatest economic or social need?

ANSWER Yes. The regulations make clear in several sections AOA's expectations that all services, not just legal assistance, should be targeted to older persons in greatest economic and social need. This provision is included, for example, in a number of subsections relative to the content of the State Plan as well as in the sections on the advocacy responsibilities of the Area Agency and in the intrastate funding formula.

6(b) LOBBYING

QUESTION Concerns have been raised about the restrictions on lobbying under 1321.71(i). One advocate group claims that these restrictions go beyond even those imposed by the Legal Services Corporation. Why the need for this new restrictive language?

Do you find any inconsistency in the language which permits a provider to use funds by private sources to engage in lobbying activities of a self-help nature?

ANSWER Our intent in the proposed regulations was to reflect appropriate provisions from the Legal Services Corporation regulations in the interest of fostering cooperation between our program and that of LSC. If a reviewer feels that there is some provision in our proposed regulations which is too restrictive, we welcome a comment to that effect together with appropriate citations from both regulations so that we may consider the matter in preparing final regulations.

We do not see any inconsistency in the language which permits a provider to use funds from private sources to engage in lobbying activities of a self-help nature.

QUESTION At the present time, do you have complete control over your Salary and Expense Budget?

ANSWER Salary and Expense funds for the Administration on Aging are part of the Salary and Expense Budget appropriated by Congress to the Office of Human Development Services DHHS. In the past, OHDS gave an allowance to AoA by object class. On May 2, 1988, the Assistant Secretary for OHDS allotted a portion of those FY 1988 funds appropriated to OHDS to be administered by AoA. The Commissioner on Aging now has control over these funds.

QUESTION Have any functions of the Commissioner been delegated to any one who does not report to the Commissioner?

ANSWER In his memorandum of January 28, 1988, (copy enclosed) Secretary Bowen directed the Assistant Secretary for Management and Budget "to examine and make recommendations on organizational and support matters concerning the Administration on Aging raised by the recent amendments including use of AoA funds in consolidated research and evaluation activities. In the interim, AoA will continue to receive logistic and other support through existing arrangements."

When that study is completed, appropriate decisions will be made regarding delegation of organizational and support functions related to AoA.



THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

JAN 28 1988

MEMORANDUM FOR: HEADS OF OPERATING DIVISIONS
HEADS OF STAFF DIVISIONS
COMMISSIONER ON AGING

FROM: The Secretary

SUBJECT: Commissioner on Aging

To implement the Older Americans Act Amendments of 1987 (P.L. 100-175), which includes the provision that the Commissioner will report directly to the Secretary, I am directing that the following action be taken.

First, to ensure that concerns of older Americans are considered fully in various policy matters addressed by this Department, the Commissioner on Aging shall report directly to me. The Commissioner will be invited to senior staff meetings and will report on important matters via the electronic morning report system. As with the staff Assistant Secretaries and OPDIV Heads reporting will be through the Under Secretary and Chief of Staff and I will continue existing procedures of seeking advice on issues raised by the Commissioner from the Assistant Secretaries and Operating Division Heads, as appropriate.

Second, the Assistant Secretary for Management and Budget is to examine and make recommendations on organizational and support matters concerning the Administration on Aging raised by the recent amendments, including use of AoA funds in consolidated research and evaluation activities. In the interim, AoA will continue to receive logistic and other support through existing arrangements.

Otis R. Bowen

Otis R. Bowen, M.D.

Question Do you have complete control over your staff?

ANSWER I have complete control over the staff of the Administration on Aging in Washington, D.C., and in the 10 Regional Offices.

QUESTION We understand that the Office of Human Development Services still claims responsibility for the Administration on Aging. Is this correct?

ANSWER As stated in Secretary Bowen's memorandum of January 28, 1988, the Commissioner on Aging reports directly to the Secretary in accordance with the provisions of the Older Americans Act Amendments of 1987. The Commissioner attends the Secretary's senior staff meetings and is able to advise the Department on matters of importance related to aging.

The January 28 memorandum also states that the Assistant Secretary for Management and Budget is to explore organizational and support issues concerning AoA which were raised by the 1987 Amendments.

In the interim, OHDS is continuing to provide organizational and logistical support to AoA.

QUESTION Are there any problems with the OHDS continuing to usurp funding and resources intended for use by AoA?

ANSWER HDS has never usurped funds appropriated by Congress. The Commissioner administers Titles III, IV and VI of the Older Americans Act. Salaries and Expense funds for AoA are part of the Salary and Expense Budget appropriated by Congress to OHDS. On May 2, 1988, the Assistant Secretary for HDS allotted a portion of those FY 19 funds appropriated to OHDS to be administered by the Commissioner on Aging. The Commissioner on Aging has complete control over these funds.

QUESTION As you know, the Ombudsman program is the only component of the Older Americans Act that is devoted to assisting the residents of nursing homes and other long term care facilities. These residents are clearly among our society's most frail and most vulnerable citizens. Do you believe that ombudsman programs are generally adequately funded?

If so, what information do you base this on?

If not, what steps have you taken to either seek additional OAA funds for ombudsman services or to provide guidance to the states as to the importance of providing adequate funding?

ANSWER Section 304(d)(1)(B) assigns to the State agency the responsibility to determine the amount of Title III funds which is adequate to conduct an effective ombudsman program under section 307(a)(12). In arriving at a decision about the adequacy of funding the State agency is to exclude any amount of funds allotted exclusively for the Ombudsman program under the special authority of section 303(a) 3. Since the Congress did not appropriate any funds under section 303 a 3 for Fiscal Year 1988, each State agency must determine what amount of Title III Part B funds received under the authority of sec. 303(a) represents an adequate amount to expend for the ombudsman program. The Older Americans Act clearly establishes the importance of the ombudsman program and we believe that each State agency is in the best position to determine what level of funding is adequate based on the unique needs of the ombudsman program in its State.

QUESTION As you know from testimony heard from the state ombudsman from the District of Columbia (Ann Hart), the State Unit on Aging in D.C. operates a nursing home. Appropriately, the ombudsman program is operated by another organization. This was not, however, always the case. It took a major scandal over nursing home conditions in D.C. to trigger moving the ombudsman program out of the State aging agency.

Would you agree that having the ombudsman program located in an agency that also operates nursing homes is a conflict of interest?

What steps do you intend to take to ensure that these types of situations do not exist?

ANSWER Since the State Agency on Aging has the responsibility to establish and operate the ombudsman program either directly or by contract or other arrangement, it is necessary that the State Agency on Aging retain an objective stance with regard to nursing home issues. Section 307(a)(12)(F) of the Act assigns to the State agency the responsibility to assure that the ombudsman program is carried out without any conflict of interest and to ensure that mechanisms are in place to identify and remedy any such conflicts. The Administration on Aging will provide oversight and assist the State agencies on aging carry out their responsibilities in this matter.

QUESTION The proposed rule would allow state aging agency directors to have access to ombudsman files, excluding, I presume, identities of complainants and residents. Obviously, it would be inappropriate for the Director of a State Agency on Aging that operates nursing homes from having access to ombudsman files. How will you modify the proposed rule to provide for this and other similar situations?

ANSWER We presently are in the midst of receiving comments on the proposed regulations. After the comment period is over, we will give serious consideration to all comments which we receive on this and other provisions of the proposed regulations as we develop the final regulations.

1. OLDER INDIANS

QUESTION What have you done regarding the development of the Inter-Agency Task Force on Older Indians?

ANSWER We fully intend to comply with the Older Americans Act and develop the Inter-Agency Task Force on Older Indians. The plan for development of the Inter-Agency Task Force on Older Indians is currently under review in the Department.

In the meantime, Dr. J. T. Garrett, a member of the Eastern Band of the Cherokee Tribe and a member of the Commissioned Corps of the U. S. Public Health Service, is serving as my Special Advisor for Native American Elders, assisting with liaison with tribal organizations and other Federal Departments and agencies serving Native American Elders. Dr. Garrett is on detail to AoA from the Indian Health Service, PHS.

2. OLDER INDIANS

QUESTION What are your plans regarding contracting for the study that Congress mandated to assess the availability and quality of services to older Indians?

ANSWER Plans are proceeding to undertake a study to meet the requirements of a Special Report to Services on Older Indians as outlined in the additional statutory provisions of the 1987 Amendments to the Older Americans Act. The Administration on Aging working with other Federal agencies which conduct similar studies, and plans to submit a report to Congress consistent with the legislative requirements by December 31, 1988.

3. OLDER INDIANS

QUESTION Indians have historically had a relationship with the Federal Government and are concerned about protecting their sovereignty when it comes to working with the States.

What are your thoughts on allowing Indian tribes to contract with State agencies instead of the more restrictive relationship that is outlined in the State plans?

ANSWER The Administration on Aging administers funds in accordance with Administration's policy of maintaining government-to-government relationships with Indian Tribes, and with recognizing the unique historical trust between the Federal Government and Indian Tribes.

At least 30 Tribes now receive funds under Title III of the Older Americans Act through State and Area Agencies on Aging. These programs provide nutrition and support services in a specified geographic area serving all older persons, including Indians.

In addition to those arrangements, there are nine Area Agencies on Aging which are Indian Tribes. These Area Agencies also receive funds from the State Agencies on Aging. In such cases services are provided to all the qualified older persons in the area seeking the services, Indians as well as others.

Mr. DOWNEY. The next panel, if they would please come forward, Donald Reilly, the Deputy Executive Director, National Council on Aging; Wilda Ferguson, President, National Association of State Units on Aging; Russell Proffitt, member, Board of Directors, National Association of Area Agencies on Aging, and Executive Director, Heritage Area Agency on Aging, Cedar Rapids, Iowa; and Michael Strader, President, National Association of Nutrition and Aging Service Programs.

Without objection, we will put all of your statements in the record and if you could summarize them, that would be helpful to us.

Mr. Reilly, if you would begin, please.

STATEMENTS OF DONALD REILLY, DEPUTY EXECUTIVE DIRECTOR, NATIONAL COUNCIL ON AGING; WILDA FERGUSON, PRESIDENT, NATIONAL ASSOCIATION OF STATE UNITS ON AGING; RUSSELL PROFFITT, MEMBER, BOARD OF DIRECTORS, NATIONAL ASSOCIATION OF AREA AGENCIES ON AGING, AND EXECUTIVE DIRECTOR, HERITAGE AREA AGENCY ON AGING, CEDAR RAPIDS, IOWA; AND MICHAEL STRADER, PRESIDENT, NATIONAL ASSOCIATION OF NUTRITION AND AGING SERVICE PROGRAMS

STATEMENT OF DONALD REILLY

Mr. REILLY. Thank you, Mr. Chairman. My remarks today represent our initial response to the proposed rules. We are still in the process of receiving comments from the Affinity membership units of the Council which have significant interest in the administration of the Older Americans Act and which will be joining NCOA in providing comments to the Administration on Aging.

Subsequent to this hearing, NCOA will submit full comments to the Administration on Aging and we will submit the same comments to the committee.

I will comment first on the 1987 amendments which the proposed regulations address. The Older Americans Act has been strengthened by these amendments. The addition to Title III of a new Part D In-Home Services for the Frail and a new Part F, Preventive Health Promotion and Education Services, reemphasized the continuing legislative intent to maintain a balance within Title III between special services to those in the greatest need, the frail elderly, with preventive services for the broader spectrum of older Americans which can prevent or delay their becoming frail.

The recognition of the needs of Native Americans and Hawaiians is long overdue, as are the additional requirements to link older American activities to the needs of the disabled, to increase outreach to minorities and the poor and to address elder abuse.

However, we are concerned about the increasing complexity of Title III with each successive set of amendments. The current trend of flat funding with erosion by inflation will tend to place heavy burdens on State agencies, area agencies, senior centers and other service providers regarding which priorities to follow and which parts of the elderly population should be served first.

Please take this as a plea, perhaps three years early, for a strategy of simplification when the Congress next considers reauthorization in 1991.

In terms of the regulations, I would like to first comment on the structuring of State area community systems. The proposed regulations clarify the structure and relationships of the Title III network. They reemphasize the primary State and area roles of planning, interagency coordination and linkages, resource marshaling, resource allocation, system monitoring, evaluation and advocacy. They reaffirm the continuing legislative intent that State and area agencies not be service providers except in special circumstances formally approved by the State agency.

For the first time, they focus attention on the statutory directives that area agencies designate community focal points for service delivery with special consideration being given to multipurpose senior centers for this role. This content is a significant improvement.

Further clarification is added by focusing on the means for delivering services to older persons in their communities. The elements of a comprehensive and coordinated community-based system are well-defined in these regulations. It is clearly stated that the resources made available to the area agency under the Older Americans Act are to be used to finance those activities necessary to achieve elements of a community-based system.

NCOA believes that these clarifications should eliminate controversies about role definitions and provide the basis for system-building as senior centers are formally designated as community focal points for service delivery.

The proposed regulations specify that area Agencies on Aging should be the "principal agents of the State" to carry out the mission of developing or enhancing of comprehensive and coordinated community-based systems in or serving communities throughout the State. They also state that each area agency engages solely in activities which are consistent with its statutory mission as prescribed in the act and has specified in State policy.

They further state that the State agencies shall withdraw the area agency designations whenever it finds that activities of the area agency are inconsistent with the statutory mission prescribed in the act or in conflict with the requirement of the act that it function only as an area Agency on Aging.

The history of Title III contains many references to bottom-up planning as the basic planning mode of the program. This was reflected in the act in Section 307(a)(1), which says that each State plan shall "contain assurances that the State plan will be based upon area plans developed by area Agencies of Aging within the State."

The language cited above could lead to the impression that talk-down planning is to be the new mode. The intent needs further clarification. Also, clarification would be helpful in the question as to where the functions performed by an area agency with funds from a source other than the Older Americans Act come under the language cited above. These questions have already been raised by committee members and we think that the questions do need to be addressed in further amendment of the proposed regulations.

Advocacy. We suggest the deletion of the restrictive language in the advocacy sections which can imply that forceful advocacy may be considered political action and thereby prohibited.

Evaluation of unmet needs. In Section 1321.52, the proposed regulations describe a system to assess unmet needs for support of services, nutrition services in multipurpose senior centers. NCOA welcomes this effort toward reestablishing the Administration on Aging and congressional data base on the need for and utilization of senior center base services. However, the proposed rule neglects to state the conferees' intent that the purpose of the survey is to produce a report to the Congress which will include "a geographical and statistical" analysis of unsatisfied demand and "specific recommendations on ways in which this unmet need can be filled."

Given the crucial nature of this survey and evaluation, the guidance to be issued by the commissioner for the production of State and, presumably, area reports by June 30, 1989, will be needed at an early date to guide the data-collection process so that the congressional intent can be satisfied.

Such guidance should be issued not less than a year prior to the deadline for the report and we believe that there should be committee oversight of the guidelines that are issued for this implementation.

Finally, the survey and evaluation must cover sites not funded under the Administration on Aging and the proposed rule does not indicate how such information will be included. This should be covered in the guidance when it is issued.

Preventive health services. This new and important program initiative, although not yet funded, deserves extended treatment, rather than just a listing under the categories of service section. The design and management of such programs at senior centers or other appropriate sites will require important elements of content and coordination and should be referenced in a brief, but separate section of the regulations.

Cash contributions for services. Although cash contributions for services are already permitted under current rules, we have some concerns about the proposed continuation of this practice. Last year, the House Subcommittee on Human Resources of the Labor and Education Committee rejected a proposal to permit the States to establish either mandatory or voluntary fee schedules for some Title III services. That proposal would have exempted certain low-income persons from the fee system.

The proposed and current rule sets no limits on which services could have a voluntary contribution schedule, including information and referral, outreach, protective services and elderly abuse services.

Although the proposed regulation repeats the statutory ban on means testing in the Older Americans Act service, we believe that the potential universality of the contribution system could lead to abuse and misunderstanding. We urge that the regulation be recast to exclude the services listed above from any voluntary fee schedule and all providers be strongly admonished to avoid any appearance of mandatory contributions.

NCOA has no direct evidence of current abuse, but we are aware of anecdotal information suggesting that flat fees and near-manda-

tory contributions are becoming more common in the system. We also question the authority for this regulation since, as far as we are aware, the Congress has specifically authorized such contributions only for nutritional services.

The statute in defining greatest social need includes geographic isolation as a defining circumstance. The proposed regulations, in identifying those who should receive priority in the provision of services, lists older persons who are frail, homebound or isolated.

The terms geographic isolation and isolated clearly describe the circumstances of many rural older persons. In addition, homebound could include in its definition persons living in rural areas without any or adequate transportation services.

The regulations should include guidance to agencies on aging and service providers that these terms are to be understood, at least in part, as describing the problems and needs of rural older persons and thereby help establish an appropriate priority for services to rural individuals. Without such clarification, rural programs and rural eligible older persons may tend to be short-changed as the resource allocation process proceeds at the area level.

Thank you, Mr. Chairman.

Mr. DOWNEY. Thank you, Mr. Reilly.

Ms. Ferguson.

STATEMENT OF WILDA FERGUSON

Ms. FERGUSON. Mr. Chairman, members of the committee, my name is Wilda Ferguson. I am President of the National Association of State Units on Aging and Commissioner of the Virginia Department for the Aging.

NASUA is pleased to have the opportunity to share with you our plans for commenting on the AOA proposed regulations and our preliminary reaction to the proposal.

As you know, NASUA is a national public interest organization comprised of the nation's 57 State Agencies on Aging. The purpose of the association is to improve the status of older people in our society by providing an organized channel for officially designated State leadership in the field of aging.

In terms of our plans for commenting on the proposed regulations, we have sent comparison summaries to the membership of our association and will be receiving their comments. Once those have been received, the Executive Committee will develop and summarize the statement that will be presented to AOA.

We will, of course, be pleased to share that statement with you at the time it is forward to AOA.

At this stage in the proposed regulation review process, we do not have specific comments from our members, nor an official association position. Therefore, today I would like to focus my comments on the current challenges facing the State units on aging as they work with area agencies on behalf of older persons and to provide some preliminary comments on how these proposed regulations may impact on our capacity to design and administer the Older Americans Act programs in our respective States.

As you well know, the Older Americans Act is a cornerstone for the development of a whole range of services and opportunities for

older persons. The Older Americans Act today has evolved to be one of the most dynamic social service components in our national safety net of support.

The Older Americans Act fosters a billion dollar social services program and a structure of administrative and advocacy units at the national, State and local levels charged to carry out the act and further its purpose. But most importantly, the act has established a mission for community. That mission is embodied in the interest to provide in every locality a range of options or a continuum of care to meet the changing needs of our older people.

The challenge is to make sure that all services in an area are coordinated and work together as a whole, and that is extremely important.

During the past two decades, our nation has witnessed in some policy areas profound shifts in authority and responsibility from the Federal level to State Government. This changing intergovernmental relationship has been especially evident in the human services field.

There has been a renewal and reinvigoration of State and local governments in this area, continued strong fiscal responsibility by State legislators and executives and a wave of State reforms in such areas as welfare and community-based long-term care, as well as increased State activism with a proliferation of new and imaginative ways of addressing critical human need.

The Federal/State partnership that was established in the Older Americans Act in 1965 can be viewed as the precursor of this new intergovernmental relationship which now undergirds many Federal human service programs.

The act clearly establishes specific roles and responsibilities for Federal, State and local government. These proposed regulations clarify, reinforce and underscore the statutory roles and responsibilities of the different levels of government for the implementation of the Older Americans Act.

The special and distinct hallmark of the Older Americans Act has been its deliberate support of a structured and functional freedom that allows State and area agencies to reflect and use differing State and community circumstances, histories, resources and change opportunities to advance the broad social and economic interests, as well as the general well-being of older persons. These proposed regulations underscore and support that principle.

From its beginning, the Older Americans Act has affirmed the preservation of independence and dignity as the ultimate goal of the network's efforts on behalf of older people. Understanding the implication of that goal for frail older persons for community-based systems of care has truly been a challenge for us.

To provide reliable and desirable community-based systems of care while at the same time protecting the individual's right to choose and control their own life requires creation of a complex and coordinated system that encompasses individual client needs, individual client preferences, the efficient delivery of quality service, the promotion of family and informal support and an adequate investment of public and private resources.

These regulations recognize the complexity of that undertaking, the need to focus our attention on systems-building, not just net-

work-building activities, and the need for a wide range of collaborative partnerships to achieve our goal.

There is still widespread developmental work which needs to be done by the State and local community levels service systems. Public agencies, officials and private organizations anxious to become active are unsure of where to direct their efforts. They need information on the character of older persons' needs and interests; they need to know what constitutes effective demand; they need to know what is a good investment of either public or private dollars. In sum, they need not only information, but ideas, concepts and designs.

As the State units on aging work to prepare States and with area agencies to prepare localities to face America's needs in the 1990s, we face numerous challenges. How can we exert a visible leadership role with other major public and private agencies to develop comprehensive systems for older persons? How can we foster collaborative decisionmaking between public and private organizations when the environment is becoming more competitive? How can we effectively balance the ongoing administrative responsibilities with the need for aggressive systems-building in a resource climate where little in the way of additional funding or staffing can be expected? How can we use the limited public resources to maintain maximum impact on the scope and quality of life available to older persons in any community?

As we do this, we must expand the following types of system-building/advocacy activities:

The creation of effective working linkages between institutional long-term care, community care, acute care and primary care service systems;

Creation of delivery models which are more anticipatory of the needs of older persons and provide the capability for early intervention;

Creation of widespread support for the notion that home- and community-based services are the principal component of a long-term care systems vehicle;

Fostering the willingness of public and private providers to coexist and collaborate in the best interests of older persons;

Finding ways to meet the service needs of the near poor who are not eligible for entitlement programs and yet are unable to pay for their own services through private means;

Finding ways to finance home- and community-based services at a level where they constitute an effective delivery response to the long-term care needs of older persons.

Neither the Older Americans Act nor the regulations can answer all of our needs in these challenging areas. However, both the act and the regulations can and should provide State and area agencies with the framework to make the critical decisions and provide the essential leadership at the State and community level.

These proposed regulations continue to provide us with that framework.

At the conclusion of the regulation review process, NASUA will no doubt have more recommendations on how to further strengthen that framework. We are concerned, for example, about the potential impact of the proposed limitation on State unit on aging au-

thority to determine an appropriate amount of program development/coordination funds for area agencies on aging.

Our recommendation in this regard will be based on the State unit's assessment of the importance of these funds to area agencies in developing community-based systems of care.

In addition, Mr. Chairman, I wish to underscore our continued interest in the Department's progress in implementing Section 201(a) of the act relating to the relationship of the Commissioner on Aging to the Secretary. We urge this committee to request information on the Department's actions and plans in this regard.

I appreciate the opportunity to be here and will look forward to sharing our additional comments and to answering any questions.

Mr. DOWNEY. Ms. Ferguson, thank you very much.

Before you proceed, Mr. Proffitt, the committee wants to recognize the presence of Congresswoman Slaughter from the Great Empire State.

Ms. SLAUGHTER. Thank you, Mr. Chairman.

Mr. DOWNEY. Do you want to make a statement?

Ms. SLAUGHTER. I have no opening statement.

Mr. DOWNEY. Thank you, Louise.

Mr. Proffitt, if you would proceed.

STATEMENT OF RUSSELL PROFFITT

Mr. PROFFITT. Representative Downey and members of the subcommittee, I am Russ Proffitt, Director of the Heritage Area Agency on Aging in Cedar Rapids, Iowa, and a member of the Board of Directors of the National Association of Area Agencies on Aging, which represents approximately 670 area agencies on aging across the nation.

Our association is currently soliciting comments from the membership on these proposed regulations, and we will submit our formal response to AOA in mid-May.

We are pleased that the rules emphasize the need for additional outreach to the low-income and minority, and that the area agencies must be responsive to all older Americans and the timeliness with which they were issued is to be commended.

We have four items which have major ramifications for the network of area agencies. The elimination of the provision for program development and coordination. Program development and coordination activities are not administration. The Older Americans Act indicates that area agencies have program development and coordination functions. The increase from 8.5 percent to 10 percent will not adequately cover the costs of many existing program development and coordination activities and when the new requirements of the 1987 amendments are added; i.e., data collection, post-secondary education opportunities compiled and disseminated, linking focal points, coordinating with Alzheimer's victims and families, there will be additional coordination and development costs.

The second item is the elimination of the restriction on States from having prior review and approval over area agencies' subgrants and contracts. The current rule states, "The State agency may not require the area agency to submit to it for prior review or

approval any proposed subgrants or contracts with public or private nonprofit agencies or organizations."

The Older Americans Act clearly shows the intent to establish area agencies as independent partners linked with the State by contractor grant through an approved plan which has been developed by the area agency.

If the area agency is required by the State to submit for its review or approval subgrants or contracts with public or private nonprofit agencies or organizations, it will invite and encourage meddling for political reasons.

Third, the issue with the potential to most disrupt the aging network is AOA's interpretation of the intent of Congress regarding the added language about entities which can serve as area agencies on aging. The proposed regulations have changed little in the section dealing with designation of area agencies. However, the Administration on Aging, in a letter to the National Association of Development Organizations, dated March 30, 1988, states: "It is permissible under the act for an area agency to be part of an umbrella agency as an identifiable unit of the umbrella agency. However, the act requires that the unit, not the entire agency, be the designated area agency. Where the area agency is located within an umbrella agency, the area agency is the recipient of Title III funds from the State Agency on Aging."

Does this, in fact, mean that a separate entity must be established and designated in order to legally receive funds from the State? If you carry out the interpretation given by AOA, the majority of area agencies on aging across the nation must be reviewed for change in designation since the vast majority of area agencies are units of umbrella agencies.

This interpretation could mean wholesale de-designation and re-designation of area agencies on aging across this nation. Unless this item is cleared up in the final regulations, we are afraid there will be 50 different interpretations across the nation, causing tremendous confusion and disruption to the network of area agencies and services to the elderly.

Finally, several references are made regarding the area agency functioning as the "agent of the State." Area agencies on aging are not agents of the State; we are not employees of the State nor do we receive State benefits.

Webster defines "agent" as "a person, firm, et cetera, empowered to act for another," and "a representative of a governmental agency." The majority of area agencies are definitely not governmental agencies, nor are they empowered to act for the State. The references to area agencies as agents of the State should be deleted throughout the regulations.

Finally, I would like to touch upon three philosophical shifts in the proposed regulations. First is the issue of AOA imposing a mission statement on area agencies. It is inappropriate to include this mission statement in the Federal regulations because it reverses the intention and history of the act, which established a bottoms-up planning and service development network.

The Department of Health and Human Services should write a mission statement for the Department. The State should write a mission statement for the State, and the area agency should write

its mission statement in compliance with the Older Americans Act Declaration of Objectives as found in Title I, Section 101.

The second philosophical change is the rule regarding the advocacy responsibilities of area agencies. The proposed rules focus advocacy activities on "the development or enhancement of comprehensive and coordinated community-based systems of services in each community."

By focusing the advocacy responsibilities of area agencies on local community organizations and by not even mentioning the need to advocate at the State and Federal level, the proposed rules run counter to the Older Americans Act, which has historically recognized the need for area agencies to advocate at all levels of government.

Area agencies should be encouraged and supported by rules to advocate for such items as State and Federal laws, to curb insurance fraud in Medicare supplements, catastrophic health insurance, spousal impoverishment, living wills, grandparents' rights and the list goes on.

Our final concern is that the tone of these proposed rules sometimes reflects an enforcement approach rather than a spirit of cooperation and positive support between the various administrative levels and the national network on aging.

I would like to ask that a letter from an area agency in New York State be submitted into the record as part of the association's statement.

Mr. DOWNEY. Without objection, so ordered.

Mr. PROFFITT. Thank you.

[The letter referred to follows:]

Albany County Department for Aging and Handicapped

112 State Street, Room 710

Albany, New York 12207

(518) 447-7177

(518) 447-7180

JAMES J. COYNE
Albany County Executive

AOA Routing Slip

Date **APR 19 1988**

4/21/88

RICHARD D. HEALY
Commissioner

APR 13 1988 **THROW**
COMMENTS:

Mr. Raymond Mastalish, Executive Director
National Association of Area Agencies on Aging
600 Maryland Avenue, S.W., Suite 208
Washington, DC 20024

Dear Ray:

As one of 456 directors of the area agencies that make up NAAA's membership I am compelled by events taking place within the Administration on Aging to write this letter to you. I must say, in doing so, that it is not within my nature, generally, to take such action, as I prefer to respond to the ebb and flow of national policy setting with energies directed inwardly.

I am incensed, however, to the point of enraged, by the attempt being made by Ms. Fisk and AOA supporters, to create a "hunters open season" on area agency directors in the OAA regulatory review process. As my enclosed letter, to Ms. Fisk points out, a scenario is taking shape within the context of creating amendments to the Older Americans Act regulations that will place every area agency director's job in jeopardy. Clearly, AOA, in the sections cited in my letter, intends to give directors of State units on aging the ability to hold area agency appropriations hostage in the plan preparation and submission process, if, in the eyes of state directors, specific area agency directors fail to demonstrate certain undefined personal, professional or political qualities. It is not difficult to understand what this means. This effort, on the part of AOA, is going to set the stage for "political warfare" between organizations and personalities in the network that, in my view, has the potential to destroy the entire system. It should be stopped immediately!

As NAAA's chief spokesperson on legislative matters, I urge you to review the sections referenced in my letter to Ms. Fisk and, in so doing, to read beyond the "veneer of noble intent" presumably intended. If you concur with my reading, I ask that you support deletion of specific sections relating to this matter. Further, I encourage that you issue a call among the balance of NAAA's membership to take a similar stand.

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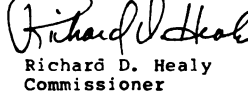
- 2 -

April 13, 1968

I am amazed and stunned beyond belief to think after a decade and one-half of hard work to build a viable system of services for older people, that our national leadership would propose a scenario that, in effect, will throw us, the local leaders in area agencies, to the dogs. May small wonders never cease!

Your prompt attention to this matter would be greatly appreciated.

Sincerely,


Richard D. Healy
Commissioner

RDH:mrh

Albany County Department for Aging and Handicapped

112 State Street, Room 710
Albany, New York 12207
(518) 447-7177
(518) 447-7180

JAMES J. COYNE
Albany County Executive

RICHARD D. HEALY
Commissioner

April 13, 1988

Hon. Carol Fraser Fisk, Commissioner
Administration on Aging, Rm 4760
Independence Avenue, S.W.
Washington, DC 20201

RE: Proposed Older American's Act Regulations, 1988

Dear Commissioner Fisk::

I am writing this letter to comment upon the proposed Older American Act (OAA) regulations prepared by the Administration on Aging (AOA) and published in the March 29, 1988 edition of the Federal register.

You and your staff are to be commended for the timeliness of your preparation of this draft document. During my fourteen years as an area agency official I cannot recall such swift action by AOA in this regard. Likewise, this version of the regulatory amendments is much more consistent in tone and far easier to digest, upon initial review, than some versions published for comment by your predecessors.

My appreciation for your efforts notwithstanding, I wish to call your attention to several aspects of AOA's proposed regulations and/or modifications before finalization of this document as federal policy.

Without concern for intent, the 1988 version of the OAA regulations, in draft form, appears to be in many instances, a statement of administrative reaction to the U.S. District Court's decision in the Meek v. Martinez case (87-1233-IV) specifically with respect to defining the nature of relationships between state units on aging (SUA's) and area agencies on aging (AAA's). In the absence of further clarification of proposed new language in sections of the regulations dealing with the responsibilities of state and area agencies it seems to me that AOA is attempting to state in numerous ways, that AAA's are "exclusive" vehicles of the state.

In particular, the phrase "under the leadership and direction of the State agency" as used in Subpart C, Section 1321.53(a), is

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April 13, 1988

acutely revealing. The term "direction" as used in this section connotes a formal, hierarchical, chain of command relationship between SUA's and AAA's which, in fact, does not exist nor should exist. Such a relationship contravenes numerous court opinions regarding substate corporations, inaccurately reflects congressional intent, and undermines the potential of AAA's to act "proactively" as called for in the same passage. I urge that the phrase be deleted and replaced with terminology that reflects an administratively informal relationship between SUA's and AAA's. I recommend that the word "direction" be replaced with either "guidance" or "supervision" both of which are informal terms that recognize a contractual and cooperative relationship between SUA's and AAA's. AOA should not attempt to use the rule making process as a means of expressing its views about the actions of the judiciary, or as a means of imposing itself into the construct of relationships between states and their subdivisions or corporations within a state. Contract law and state constitutions define these relationships in each state quite adequately.

I also wish to call your attention to the precedent setting language found in section 1321.53(10) that describes AOA's expectations of leaders in area agencies". As written, this section enunciates a "vague job description" for AAA directors. This not so subtle effort, to identify the characteristics desired by AOA for every AAA director is well beyond the bounds of AOA's range of interest and should be deleted. Never, in my fourteen years of association with the aging network, and twenty years of public service, have I witnessed the inclusion of such nebulous descriptors about a specific category of individuals in the regulatory process. The criteria set forth in this section, by its very presence, has the potential to usurp the authority of appointing bodies at the local level. In addition, the subjective descriptors of "respect" "capacity" and "authority" imply performance criteria for which commonly accepted personnel standards do not exist. By what available criteria for instance, does one measure the degree of "respect" an individual retains? Whose measure of respect, or lack of respect, will weigh heaviest in decision making about the past, present and future performance of an individual director? Can respect, capacity or authority be measured objectively? I think not.

As an alternative, I strongly support the notion of utilizing the regulatory process to require states to establish minimum criteria concerning education, previous experience, etc., for executives employed throughout the aging network. I suggest that AOA examine segments of the Social Security Act, and other similar statutes, that have initiated steps to establish criteria for "leaders" within the acute care and long term care health industries, and other disciplines at the state and local level. Certification and/or licensure of professionals within the aging network, in my judgment, is long overdue.

Be that as it may, Section 1321.53(10) is an ill conceived and counter productive addition to the amendment process that I strongly oppose. Eliminate this section, please.

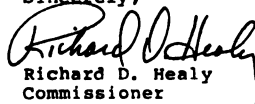
April 13, 1988

Lastly, as a technical point, I wish to call your attention to section 1321.17(f)(6). The phrase in this section requires that area plans specify amounts expended for each priority service in the "past" fiscal year. In New York, at least, the practice has been to identify such funds as proposed to be spent in the "subsequent" year in plan submissions. If this represents a departure from that practice, is there a compelling reason for such? If so, a clarification seems to be in order.

Thank you again for your prompt preparation and dissemination of the proposed OAA regulations. Thanks also for giving your consideration to the concerns I have attempted to bring to your attention.

With kindest regards, I am

Sincerely,


Richard D. Healy
Commissioner

RDH:mrh

Mr. PROFFITT. Mr. Chairman, these are some of the issues in the proposed rulemaking that the National Association of Area Agencies on Aging will be addressing during the remainder of the comment period. We appreciate the opportunity to bring them to your attention and hope that Congress will take a very serious look at the disruptive impact these proposed rules will have on area agencies on aging and the comprehensive coordinated service-delivery systems we have built over the past 22 years under the Older Americans Act.

Thank you.

[The prepared statement of Mr. Proffitt follows:]

PREPARED STATEMENT OF RUSSELL PROFFITT
NATIONAL ASSOCIATION OF AREA AGENCIES ON AGING (NAAAA)
STATEMENT ON
PROPOSED RULEMAKING ON THE OLDER AMERICANS ACT AMENDMENTS OF 1987

REPRESENTATIVE DOWNEY, AND MEMBERS OF THE SUBCOMMITTEE ON HUMAN SERVICES OF THE HOUSE SELECT COMMITTEE ON AGING. MY NAME IS RUSS PROFFITT, EXECUTIVE DIRECTOR OF THE HERITAGE AREA AGENCY ON AGING IN CEDAR RAPIDS, IOWA. I AM A MEMBER OF THE BOARD OF DIRECTORS OF THE NATIONAL ASSOCIATION OF AREA AGENCIES ON AGING WHICH REPRESENTS THE BOARDS, THE ADVISORY COUNCILS, SERVICE PROVIDERS AND STAFF OF APPROXIMATELY 670 AREA AGENCIES ON AGING ACROSS THE NATION.

THANK YOU FOR PROVIDING OUR ASSOCIATION THE OPPORTUNITY TO COMMENT ON THE NOTICE OF PROPOSED RULEMAKING ISSUED BY THE ADMINISTRATION ON AGING (AoA) ON MARCH 29, 1988. OUR ASSOCIATION IS CURRENTLY SOLICITING COMMENTS FROM THE MEMBERSHIP ON THESE PROPOSED REGULATIONS. WE WILL DEVELOP AND SUBMIT OUR FORMAL RESPONSE TO AoA IN MID MAY. EVEN AT THIS EARLY STAGE IN THE COMMENT PERIOD, OUR OFFICE HAS RECEIVED NUMEROUS COMMUNICATIONS FROM THE MEMBERSHIP. THEIR OBSERVATIONS ARE REFLECTED IN THIS STATEMENT.

HISTORICALLY, REGULATIONS FOR THE OLDER AMERICANS ACT (OAA) HAVE PROVIDED CLARIFICATION AND INTERPRETATION OF THE INTENT OF CONGRESS FOR THOSE ADMINISTERING THE LAW AT THE STATE AND LOCAL LEVELS. THEIR TONE ENCOURAGED A COOPERATIVE WORKING RELATIONSHIP BETWEEN THE VARIOUS COMPONENTS OF THE NETWORK ON AGING CREATED UNDER THE ACT. PREVIOUS REGULATIONS HAVE SUPPORTED THE VERY BASIC AND POSITIVE TENET OF THE ACT WHICH PROVIDES THAT ELDERLY PERSONS HAVE MAXIMUM OPPORTUNITY TO DETERMINE THE SCOPE AND FOCUS OF PROGRAMS FOR OLDER AMERICANS AT THE LOCAL LEVEL, WITHIN THE BROAD FRAMEWORK OF THE ACT.

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MY REMARKS WILL BE PRESENTED IN THREE CATEGORIES:

1. ACKNOWLEDGING THE POSITIVE ITEMS IN THE PROPOSED RULEMAKING;
2. IDENTIFYING THOSE ITEMS WHICH MUST BE STUDIED VERY CAREFULLY TO UNDERSTAND THEIR POTENTIAL RAMIFICATIONS FOR THE NETWORK OF AREA AGENCIES; AND
3. THE PHILOSOPHICAL SHIFT WE BELIEVE IS REFLECTED IN THESE DRAFT REGULATIONS.

A. POSITIVE ITEMS IN THE PROPOSED RULEMAKING

1. NUMEROUS ITEMS ARE ADDED TO THE PROPOSED RULEMAKING WHICH EMPHASIZE THE NEED FOR ADDITIONAL OUTREACH TO THE LOW INCOME AND MINORITY ELDERLY. RECOGNIZING THE TREMENDOUS NEED THAT EXISTS AMONG THESE TARGETED GROUPS, WE WELCOME THIS ADDITIONAL LANGUAGE, PARTICULARLY AS WE CONSTRUCT OUR CONTRACTS AND GRANTS WITH SERVICE PROVIDER AGENCIES.
2. AT THE SAME TIME, WE ALSO WELCOME THE LANGUAGE RECOGNIZING THAT THE AREA AGENCIES MUST BE RESPONSIVE TO ALL OLDER AMERICANS - ONLY WHEN WE FUNCTION IN THIS MANNER, CAN WE RETAIN THE BROAD BASE OF SUPPORT IN THE ENTIRE AGING COMMUNITY FOR THE OLDER AMERICANS ACT.
3. WE WELCOME THE REDUCTION IN LANGUAGE IN SECTION 1321.71, "LEGAL ASSISTANCE". HOWEVER, WE ARE WORKING WITH THE NATIONAL SENIOR CITIZENS LAW CENTER TO DETERMINE THE IMPLICATIONS OF THIS REDUCTION. WE UNDERSTAND THE REMAINING LANGUAGE MAY IN FACT, BE MORE RESTRICTIVE.

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4. WE ALSO WANT TO COMPLIMENT AOA FOR THE TIMELINESS IN ISSUING THESE PROPOSED REGULATIONS AND FOR NOT ISSUING THEM AS INTERIM FINAL REGULATIONS. WE TRUST THEY WILL TAKE OUR COMMENTS, AND THOSE OF OUR COLLEAGUES, INTO CONSIDERATION AS THE FINAL REGULATIONS ARE DEVELOPED.

B. ITEMS WITH POTENTIAL MAJOR RAMIFICATIONS FOR THE NETWORK OF AREA AGENCIES

1. ELIMINATION OF PROVISION FOR PROGRAM DEVELOPMENT AND COORDINATION.

PROGRAM DEVELOPMENT FUNDS HAVE HISTORICALLY BEEN USED BY AREA AGENCIES TO EXPAND SERVICES, GENERATE ADDITIONAL RESOURCES, AND TO COORDINATE PUBLIC AND PRIVATE ACTIVITIES ON BEHALF OF OLDER AMERICANS. WHEN THIS ADMINISTRATION PREVIOUSLY ATTEMPTED TO ELIMINATE THIS CATEGORY OF FUND USE, NAAAA DOCUMENTED THE FACT THAT THE RESOURCES USED IN THIS CATEGORY RESULTED IN THE GENERATION OF ADDITIONAL MILLIONS OF DOLLARS IN PROGRAM FUNDS FOR THE ELDERLY WITHIN THEIR COMMUNITIES — FAR EXCEEDING ANYTHING PROVIDED FOR UNDER THE OLDER AMERICANS ACT. WE WERE ABLE TO SHOW THAT OUR MANDATE TO GO OUT AND BE CREATIVE IN GENERATING AND TAPPING OTHER RESOURCES ON BEHALF OF THE ELDERLY WAS INDEED WORKING, AND WORKING VERY WELL.

IT THEREFORE STRIKES US AS INCONCEIVABLE THAT THE PROPOSAL WOULD AGAIN BE MADE TO ELIMINATE THIS ACTIVITY. SURELY WE KNOW BY NOW THAT THE LIMITED ADMINISTRATIVE FUNDS RECEIVED BY MOST AREA AGENCIES, SIMPLY DOES NOT ALLOW US SUFFICIENT RESOURCES TO UNDERTAKE PROGRAM DEVELOPMENT AND COORDINATION ACTIVITIES. THIS SEEMS INCONSISTENT WITH THE EXPANDED FOCUS ON OUTREACH TO SERVE LOW INCOME AND MINORITIES. IF

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ADDITIONAL PERSONS IN NEED ARE FOUND, HOW WILL THEY BE SERVED WITHOUT ADDITIONAL SERVICE FUNDS BEING GENERATED? THE AMOUNT PUT BACK INTO SERVICES FROM PROGRAM DEVELOPMENT WILL NOT MATCH THE NEED.

IT IS ONE THING FOR AOA TO ELIMINATE THE PROVISION FROM THE REGULATIONS, IT SEEMS QUITE ANOTHER FOR THEM TO IMPINGE UPON STATE FLEXIBILITY BY DEFINITELY STATING IN THE "SUPPLEMENTARY INFORMATION" SECTION OF THE PROPOSED RULEMAKING, THAT PROGRAM DEVELOPMENT AND COORDINATION ACTIVITIES MAY NO LONGER BE FUNDED AS A COST OF SUPPORTIVE SERVICES!

WE ALSO POINT OUT THAT THE REASON GIVEN FOR ELIMINATING THIS FUND USE IS NOT NECESSARILY VALID - NOT ALL STATES WILL ALLOW AREA AGENCY ADMINISTRATION TO BE INCREASED TO 10%. SOME STATES HAVE ALREADY INDICATED THEY WILL NOT ALLOW THE INCREASE. FURTHERMORE, WE ARE TALKING ABOUT DIFFERENT TYPES OF ACTIVITIES - PROGRAM DEVELOPMENT AND COORDINATION IS NOT THE SAME AS ADMINISTRATION.

AND ONE LAST POINT ON THIS ITEM - THE IMPACT ON LOW INCOME RURAL AREAS WILL BE MOST SEVERE. SINCE ADMINISTRATIVE FUNDS ARE BASED ON A PERCENTAGE OF TITLE III, THOSE WITH THE SMALLEST BASE WILL BENEFIT THE LEAST. AGAIN, WE KNOW THAT COSTS ASSOCIATED WITH PROGRAM DEVELOPMENT AND COORDINATION ARE OFTENTIMES HIGHER IN RURAL AREAS WHERE LONG DISTANCES MUST BE TRAVERSED.

OUR ASSOCIATION WILL BE WORKING DILIGENTLY DURING THE NEXT COUPLE WEEKS TO COLLECT SPECIFIC INFORMATION REGARDING THE DEVASTATING IMPACT

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THIS CHANGE IN REGULATIONS WILL HAVE ON A SUBSTANTIAL NUMBER OF AREA AGENCIES ACROSS THIS NATION. WE WILL BE HAPPY TO SHARE THAT INFORMATION WITH YOU.

2. AGAIN, WE ARE CONCERNED ABOUT AN ITEM WHICH WAS ELIMINATED FROM THE CURRENT REGULATIONS - THE RESTRICTION ON STATES HAVING PRIOR REVIEW AND APPROVAL OVER THE AREA AGENCY'S SUB-GRANTS AND CONTRACTS.

THIS APPEARS TO BE DRAWING A FINE LINE ON THE SEPARATION OF STATE AND AREA AGENCY ACTIVITIES AND CONTROL AT THE LOCAL LEVEL. THE REASON GIVEN FOR ELIMINATING THIS PROVISION FAILS TO RECOGNIZE WHY THE ITEM WAS INCLUDED IN THE REGULATIONS TO BEGIN WITH -- TO PROTECT LOCAL DECISION MAKING AND TO ELIMINATE THE POSSIBILITY OF STATE INFLUENCE AND POLITICS BEING IMPOSED IN THE LOCAL GRANT-MAKING AND CONTRACTING PROCESS.

WE BELIEVE LANGUAGE IN THE CURRENT REGULATIONS SHOULD BE REPEATED IN THE NEW REGULATIONS.

3. THE MOST CONFUSING AND ALARMING ITEM WITH THESE PROPOSED RULES IS THE FAILURE TO MAKE EXPLICITLY CLEAR THE INTENT OF CONGRESS WHEN THEY ADDED LANGUAGE THAT AN AREA AGENCY SHALL BE (AMONG OTHERS) ..."ANY OFFICE OR AGENCY OF A UNIT OF GENERAL PURPOSE LOCAL GOVERNMENT, WHICH IS DESIGNATED TO FUNCTION ONLY FOR THE PURPOSE OF SERVING AS AN AREA AGENCY..."

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COMMITTEE REPORT LANGUAGE WENT ON TO SAY: "THIS AMENDMENT WOULD NOT PROHIBIT LOCAL OFFICIALS FROM INCLUDING THE AREA AGENCY ON AGING WITHIN AN 'UMBRELLA' AGENCY, SUCH AS A CITY OR COUNTY HUMAN SERVICE DEPARTMENT, COUNCIL OF GOVERNMENTS, OR REGIONAL PLANNING DISTRICT AS LONG AS THE AREA AGENCY ON AGING REMAINED A DISTINCTLY SEPARATE UNIT".

THE LAW, AND COMMITTEE REPORT LANGUAGE IS QUITE CLEAR AS TO THE INTENT. THE PROPOSED REGULATIONS HAVE CHANGED LITTLE IN SECTION 1321.33 "DESIGNATION OF AREA AGENCIES".

THE CONFUSION COMES FROM STATE INTERPRETATION ALREADY BEING MADE AND IN LETTERS FROM THE ADMINISTRATION ON AGING. THE MINNESOTA BOARD ON AGING (MBA), FOR EXAMPLE, RECENTLY ISSUED DRAFT POLICIES WHICH STATE:

THE LEGAL AND ORGANIZATIONAL STRUCTURE OF AN AREA AGENCY ON AGING MUST MEET THE FOLLOWING CRITERIA (AMONG OTHERS):

- a. THE ENTITY MUST BE INCORPORATED UNDER THE LAWS OF THE STATE OF MINNESOTA AS A NON-PROFIT CORPORATION...OR (BE) EMPOWERED THROUGH A COMBINATION OF UNITS OF GENERAL PURPOSE GOVERNMENT...
- b. THE ENTITY MUST FUNCTION ONLY AS THE AREA AGENCY ON AGING AND BE SUPERVISED DIRECTLY BY THE MINNESOTA BOARD ON AGING.
- c. THE ENTITY MUST HAVE A BOARD OF DIRECTORS MADE UP OF AT LEAST ONE REPRESENTATIVE FROM EACH COUNTY IN THE PLANNING AND SERVICE AREA, WHICH FUNCTIONS ONLY AS THE GOVERNING BODY OF THE AREA AGENCY ON AGING.

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- d. WHEN THE ENTITY IS HOUSED IN AN UMBRELLA AGENCY FOR ADMINISTRATIVE PURPOSES, THE AREA AGENCY ON AGING MUST BE A SEPARATE UNIT UNDER THE SUPERVISION OF THE MINNESOTA BOARD ON AGING AND FUNCTION ONLY AS THE AREA AGENCY ON AGING.

THE ADMINISTRATION ON AGING, IN A LETTER TO THE MBA STATED:

"...WHERE A MULTIPURPOSE UMBRELLA AGENCY CREATES A SEPARATE ORGANIZATIONAL UNIT WITHIN ITS STRUCTURE FOR PURPOSES OF THE OLDER AMERICANS ACT, THAT UNIT, RATHER THAN THE ENTIRE UMBRELLA AGENCY, MUST BE THE DESIGNATED AREA AGENCY ON AGING."

IN ANOTHER LETTER FROM THE ADMINISTRATION ON AGING TO THE NATIONAL ASSOCIATION OF DEVELOPMENT ORGANIZATIONS, THEY ALSO STATE:

"IT IS PERMISSIBLE UNDER THE ACT FOR AN AREA AGENCY TO BE PART OF AN UMBRELLA AGENCY AS AN IDENTIFIABLE UNIT OF THE UMBRELLA AGENCY; HOWEVER, THE ACT REQUIRES THAT THE UNIT, NOT THE ENTIRE AGENCY, BE THE DESIGNATED AREA AGENCY...WHERE THE AREA AGENCY IS LOCATED WITHIN AN UMBRELLA AGENCY, THE AREA AGENCY IS THE RECIPIENT OF TITLE III FUNDS FROM THE STATE AGENCY ON AGING."

THIS IN FACT MEANS A SEPARATE ENTITY MUST BE ESTABLISHED AND DESIGNATED IN ORDER TO LEGALLY RECEIVE FUNDS FROM THE STATE.

IF YOU CARRY OUT THE INTERPRETATION GIVEN BY AoA AND THE MBA, THE MAJORITY OF THE AREA AGENCIES ON AGING ACROSS THIS NATION MUST BE

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REVIEWED FOR CHANGE IN DESIGNATION, SINCE THE VAST MAJORITY OF AREA AGENCIES ARE PART OF REGIONAL PLANNING DISTRICTS, COUNCILS OF GOVERNMENT, COUNTY, AND PRIVATE NON-PROFIT UMBRELLA AGENCIES. IT WOULD MEAN NO COG, RPD, UNITED WAY AGENCY, NOR EVEN A COUNTY SOCIAL SERVICES DEPARTMENT, COULD BE DESIGNATED AN AREA AGENCY ON AGING. IT IS POSSIBLE THAT THIS INTERPRETATION COULD MEAN WHOLESale DEDESIGNATION AND REDESIGNATION OF AREA AGENCIES ON AGING ACROSS THIS NATION. WE DO NOT BELIEVE THIS WAS THE INTENT OF THE CONGRESS AND APPEARS TO RUN COUNTER TO CONFERENCE COMMITTEE LANGUAGE.

WE BELIEVE THE INTENT WAS TO HAVE AN AREA AGENCY WHICH IS WITHIN AN UMBRELLA AGENCY, BE VISIBLE AND FUNCTION AS ITS OWN UNIT IN ADMINISTERING THE OLDER AMERICANS ACT, NOT FOR IT TO BE A SEPARATELY DESIGNATED AGENCY.

UNLESS THIS ITEM IS CLEARED UP IN THE FINAL REGULATIONS, WE ARE AFRAID THERE WILL BE 50 DIFFERENT INTERPRETATIONS ACROSS THIS NATION, CAUSING TREMENDOUS CONFUSION AND DISRUPTION TO THE NETWORK OF AREA AGENCIES AND SERVICES TO THE ELDERLY.

4. ANOTHER ITEM WHICH NEEDS FURTHER CLARIFICATION IS THE DEFINITION OF DIRECT SERVICES, WHICH MEANS "ANY ACTIVITY PERFORMED TO BENEFIT AN OLDER INDIVIDUAL BY THE STAFF OF AN AREA AGENCY..." WE WOULD HOPE THAT ALL ACTIVITIES UNDERTAKEN BY AREA AGENCY STAFF WOULD BENEFIT AN OLDER INDIVIDUAL OR INDIVIDUALS, OTHERWISE, WE ARE NOT SURE WHY AREA AGENCY STAFF WOULD BE ENGAGED IN SUCH ACTIVITIES!

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5. SEVERAL REFERENCES ARE MADE REGARDING THE AREA AGENCY FUNCTIONING AS THE AGENT OF THE STATE. THE LAW HAS BEEN VERY CLEAR IN DRAWING A DISTINCTION BETWEEN AREA AGENCIES AND STATE AGENCIES AND STIPULATES THAT THE AREA AGENCY CANNOT BE AN EXTENSION OF THE STATE AGENCY. THIS NEW LANGUAGE NEEDS FURTHER CLARIFICATION.
6. ANOTHER NEW PROVISION WOULD APPEAR TO ADD CONFUSION RATHER THAN CLARIFICATION. THAT IS THE REQUIREMENT THAT AREA AGENCIES MUST DEFINE "COMMUNITY", AND THAT THE DEFINITION MUST BE APPROVED BY THE STATE.

C. PHILOSOPHICAL SHIFT IN THE PROPOSED REGULATIONS

IN THE CONTEXT OF THE PHILOSOPHICAL SHIFT IN THE PROPOSED RULEMAKING, I WOULD LIKE TO POINT OUT SEVERAL ITEMS WE BELIEVE MAY HAVE A DETRIMENTAL IMPACT UPON THE NETWORK OF AREA AGENCIES AND ON SERVICE DELIVERY TO OUR NATIONS OLDER AMERICANS.

1. WE ARE CONCERNED ABOUT ADDED LANGUAGE WHICH RESTRICTS AND DEFINES THE SCOPE OF ACTIVITIES OF THE AREA AGENCY ON AGING. PREVIOUS REGULATIONS RECOGNIZED THAT AREA AGENCIES COULD DO MORE THAN JUST ADMINISTER THE OLDER AMERICANS ACT, I.E., ADMINISTER OTHER FEDERAL, STATE AND LOCAL AGING PROGRAMS AND EVEN DO DIRECT SERVICE PROVISION WITH OTHER PUBLIC OR PRIVATE FUNDS. WE SEE THIS NEW LANGUAGE AS ANOTHER ATTEMPT BY THE FEDERAL GOVERNMENT TO RESTRICT AREA AGENCIES. AGAIN, THIS APPEARS TO

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BE INCONSISTENT WITH THIS ADMINISTRATION'S APPROACH TO ALLOW MAXIMUM FLEXIBILITY TO THE STATE AND LOCAL LEVEL AS TO HOW AGING PROGRAMS SHOULD BE ADMINISTERED.

EXAMPLES INCLUDE THE FOLLOWING ADDED LANGUAGE: "TITLE III FUNDS ARE TO BE USED FOR THE PURPOSE OF ASSISTING THE STATE AGENCY TO DEVELOP OR ENHANCE COMPREHENSIVE AND COORDINATED COMMUNITY BASED SYSTEMS. AREA AGENCIES...SERVE AS ITS (STATE AGENCY) AGENT..."

THE SAME CONCERN CAN BE MADE ABOUT THE FEDERAL GOVERNMENT DEFINING THE "STATUTORY MISSION" FOR AREA AGENCIES ON AGING. AGAIN, WE REPEAT, THE STRENGTH OF THE OLDER AMERICANS ACT HAS BEEN THE INVOLVEMENT OF ELDERLY PERSONS ON THE ADVISORY COUNCILS WHO DETERMINE THE DIRECTION OF PROGRAM IMPLEMENTATION AT THE LOCAL LEVEL - NOT AS DEFINED IN WASHINGTON OR EVEN AT THE STATE LEVEL. THIS IS PERHAPS THE MOST SIGNIFICANT PROVISION IN THIS ACT, WHICH MUST BE PRESERVED IF THE OVERALL PROGRAM IS TO BE PRESERVED.

2. THE THRUST OF THE PROPOSED RULEMAKING, WHILE INCREASING STATE FLEXIBILITY, DOES NOT PROVIDE FOR NATIONAL GUIDELINES AND INTERPRETATION ON SOME VERY CRITICAL ITEMS, SOME OF WHICH WE HAVE IDENTIFIED IN THIS STATEMENT. OUR FEAR IS THAT THIS WILL RESULT IN FURTHER FRAGMENTATION OF THE OLDER AMERICANS ACT PROGRAM AND REDUCE THE STRONG CONGRESSIONAL SUPPORT THE ACT HAS RECEIVED SINCE ITS INCEPTION.

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3. OUR FINAL CONCERN IS THAT THE TONE OF THESE PROPOSED RULES REFLECTS AN ENFORCEMENT APPROACH RATHER THAN A SPIRIT OF COOPERATION AND POSITIVE SUPPORT BETWEEN THE VARIOUS ADMINISTRATIVE LEVELS IN THE NATIONAL NETWORK ON AGING. I WOULD LIKE TO ASK THAT A LETTER FROM AN AREA AGENCY IN NEW YORK STATE BE SUBMITTED INTO THE RECORD AS PART OF THE ASSOCIATION'S STATEMENT. THIS LETTER ELOQUENTLY STATES THIS CONCERN.

MR. CHAIRMAN, THESE ARE SOME OF THE ISSUES IN THE PROPOSED RULEMAKING THE NATIONAL ASSOCIATION OF AREA AGENCIES ON AGING WILL BE ADDRESSING DURING THE REMAINDER OF THE COMMENT PERIOD. WE APPRECIATE THE OPPORTUNITY TO BRING THEM TO YOUR ATTENTION AND HOPE THAT THE CONGRESS WILL TAKE A VERY SERIOUS LOOK AT THE DISRUPTIVE IMPACT THESE PROPOSED RULES MAY HAVE ON AREA AGENCIES ON AGING AND THE COMPREHENSIVE COORDINATED SERVICE DELIVERY SYSTEMS WE HAVE BUILT OVER THE PAST TWENTY-TWO YEARS UNDER THE OLDER AMERICANS ACT. THANK YOU.

Mr. DOWNEY. Thank you, Mr. Proffitt.
Mr. Strader.

STATEMENT OF MICHAEL STRADER

Mr. STRADER. Chairman Downey, members of the House Subcommittee on Human Resources, I am Michael Strader, President of the National Association of Nutrition and Aging Service Programs, NANASP, and a Nutrition Project Director from East Central Illinois.

On behalf of NANASP, I would like to thank you for this opportunity to testify on the proposed regulations for the Older Americans Act as amended in 1987.

NANASP is a membership organization representing direct service providers in the aging network nationwide. An important part of our mission is to convey to decisionmakers in Washington information and reactions to proposed laws and rules that are grounded in day-to-day operation of nutrition and other supporting service programs. In essence, our voice is the voice of professionals working in the field with older clients providing the end product of your legislative efforts.

We can speak for all service providers in stating that we are very pleased with the timely development of the regulations by the Administration on Aging and wish to go on record indicating the importance of these rules in accomplishing a smooth transition to the new amendments in the act.

Of special importance to service providers were the statements included in the regulations that strengthen the role of State units on aging. It has been NANASP's observation that the ability of service providers to work most effectively at a local community level is directly related to the strong and visionary State agency.

Many of our members had expressed concern in the past over the degree of discretion exercised at the area agency level. Contract decisions by area agencies on aging for service provisions are not always made with an emphasis on providing a coordinated system of service delivery. In fact, some recent funding decisions around the country have served to fragment the delivery network and this disruption has created great distress for participants in local communities.

NANASP is firmly committed to the Administration's efforts to create a coordinated system of care and supports the language in the regulation that clearly positions the State as "the leader relative to all aging issues on behalf of older persons in that State."

We are pleased that State units are specifically charged with developing and enforcing written policies governing all aspects of programs under the act. We also fully support the language that emphasizes that State agencies monitor area agencies to ensure that area agencies' activities are within statutory guidelines and clarifies the State's right to withdraw area agency designation, if appropriate.

NANASP has found through informal surveys of its membership that there is significant unmet need for both congregate and home-delivered meals, as well as supportive services. We were pleased with the sections of the regulations that called for States to submit

data to the Commissioner by June 1989. We would add that it is sometimes more difficult to track the unmet need for congregate meals because waiting lists of individuals are seldom maintained or appropriate for that service. We found, however, that it was most telling to identify communities or neighborhoods which are eager for a congregate site but, because of lack of funding, have had to go unserved. This data could be key in accurately recognizing the importance of all community based care options for our older Americans.

The proposed rules address advocacy responsibilities for States and area agencies and conclude both Sections (1321.13 and 1321.61) with the statement that, "No requirements of this Section shall be deemed to supersede statutory or other regulatory restrictions regarding lobbying or political advocacy with Federal funds." As this committee is aware, the current Administration, through the issuance of the Office of Management and Budget Circular A-102, placed considerable restrictions on advocacy functions of federally funded programs such as ours. If the Office of Management and Budget Circulars or Executive Orders are considered either statutory, or regulatory, it would appear that it would be most difficult to carry out such advocacy responsibilities.

Additionally, we are very confused about the advocacy role of service providers. The Administration on Aging State units and area agencies all have responsibility to advocate on behalf of the needs and service for the older Americans, but nowhere is the role of service providers clearly articulated. Is it to be assumed that advocacy responsibilities of direct service providers are included under area agency responsibilities or are service providers clearly excluded from advocating on behalf of the older American? The regulatory language needs to be more clearly written on this point.

NANASP is concerned with the issue of transfer between the congregate and home-delivered meals, (1321.45) as well as transfers between Part B and C of the title. Virtually all moneys transferred in the past have been taken from the congregate meals program to in-home services. It is important for this committee and the Commissioner to understand the vital link the congregate program provides in a true continuum of care. The congregate meals program offers not only the recognized socialization, nutrition and access points to services that was originally envisioned, but it also serves as the hub of home-delivered meal service provisions, particularly in many of the rural areas of the country. Ironically, if adequate funding for this program is not protected, the mechanism for meal service to many homebound will be seriously affected. In addition, as more and more clients request home-delivered meals related to an early hospital discharge, we are finding that the congregate program provides a secondary level of recuperative care that is essential in returning the older person to full independence.

We recognize the law gives substantial leeway in transfer of monies, but we ask that regulatory language be examined and, if possible, strengthened to ensure that our congregate meal program is not dismantled in our eagerness to provide in-home service.

Another concern is the issue of service contributions (1321.67). No level of the aging network is more closely attuned to the importance of voluntary contributions than service providers. Yet our

membership is sensitive to the delicate balance that must be maintained and encouraging cost sharing by participants on one hand and reaching our target population of low-income minority seniors on the other.

We bring this dilemma to the committee's attention, noting that the participant donations have increased from \$71 million in fiscal year 1981 to \$163 million in fiscal year 1987. That is a dramatic increase that has allowed us to maintain nutrition program service levels, but perhaps has cost us the participation of some of our neediest clients. "Suggested contribution schedules" allowed in the regulatory language must be carefully constructed and presented to ensure that self-elimination from programs is not fostered among clients who cannot meet an established donation level.

Our other concern surrounding contributions centers on the maintenance of those contributions with the generating program. While regulatory language states clearly that contributions be used only to expand services, actual experience shows us that increases in nutrition donations often lead to increased transfer of dollars out of nutrition programs.

For example, in rural Minnesota, a congregate meals program was faced with a shortage of money to keep all established sites open. The project participants themselves mounted a major campaign to increase donations and raised the average per meal contribution from \$1.10 per meal to \$1.40 per meal. This grassroots effort was so successful that the project not only maintained its level of service but had some extra dollars to carry into the next fiscal year. The sad ending to this inspiring story is that the local area agency on aging developed a new policy disallowing carryover, transferred the extra dollars to another service area and forced the nutrition project to once again face the possibility of closing sites.

Regulatory language needs to ensure not only that contributions stay with the program, but also clearly indicate that a "back-door approach" to removing those dollars through the transfer authority will not be tolerated.

Our final point is to offer our strong support to the concept that is reflected in these regulations that each local community should have a designated focal point where older people can go for information and assistance. This focal point might be a senior center, a nutrition site or even a town hall. The importance lies with the regulatory language that assures community ownership of the system.

Thank you.

Mr. DOWNEY. I want to thank each of you for your testimony. During the consideration of the 1987 amendments, all of your organizations played an especially important role in helping us to develop those amendments. It is appropriate that at this juncture you come in once again and give us the wisdom of your ideas and the realities that you all face in terms of how they will be affected by these regulations.

It is our intention to make all of your testimony part of the hearing record that we will submit to AOA as part of our public comments about their regulations.

Again, I wish to thank you for your involvement today.

Ms. SNOWE. I, likewise, want to thank all of you, because I think you made some excellent points and suggestions and clarifications for the proposed regulations.

We will follow up in the subcommittee in order to ensure that your comments are taken into consideration and we will make some of the necessary changes to the regulations that each of you has indicated.

Mr. DOWNEY. We will next hear from Alfred Chiplin, Staff Attorney, National Senior Citizens Law Center; Anne Hart, National Association of State Ombudsmen Programs, also the Long-Term Care Ombudsman for the District of Columbia; Penelope Hommel, the Executive Director, Center for Social Gerontology; and Curtis Cook, the Executive Director, National Indian Council on Aging.

I would ask you, if you could, we will submit all of your statements for the record in their entirety and if you could summarize the major points of your statement for the subcommittee, it would be appreciated by Congresswoman Snowe and myself.

Mr. Chiplin, if you would start.

STATEMENTS OF ALFRED J. CHIPLIN, JR., STAFF ATTORNEY, NATIONAL SENIOR CITIZENS LAW CENTER; ANNE HART, NATIONAL ASSOCIATION OF STATE OMBUDSMAN PROGRAMS (ALSO THE LONG TERM CARE OMBUDSMAN FOR THE DISTRICT OF COLUMBIA); PENELOPE HOMMEL, EXECUTIVE DIRECTOR, CENTER FOR SOCIAL GERONTOLOGY; AND CURTIS COOK, EXECUTIVE DIRECTOR, NATIONAL INDIAN COUNCIL ON AGING

STATEMENT OF ALFRED J. CHIPLIN, JR.

Mr. CHIPLIN. Thank you, Mr. Chairman. My name is Alfred Chiplin. I am the staff attorney with the National Senior Citizens Law Center here in Washington, where I provide technical assistance to legal-assisted funded programs through the Older Americans Act and also under the Legal Services Corporation Act.

As a summary of my testimony, I would like to emphasize a few points. First of all, under the heading of AOA direction to State and area agencies on aging, over the years, the AOA has taken a hands-off approach in its relationship to and guidance of State and area agencies on aging with respect to their functions. Under the notion of allowing flexibility, the AOA continues its hands-off approach.

Throughout the proposed regulations, the AOA fails to provide critical direction that could lead to uniformity in the many activities that are common to all State and area agencies on aging. For example, the proposed regulations fail to specify the information needed by the AOA and the form in which that data should be submitted to fulfill its data-collection responsibilities under Section 1321.17(e) of the proposed regulations and 1321.17(f)(9).

They also fail to provide critical direction about the nature and scope of outreach and targeting activities, 1321.17(f)(8). The regs fail to make clear a uniform procedure for public notice and public participation in hearings on State and area plans, 1321.27.

The regs fail to set meaningful standards and parameters for the States to use in developing funding formulas for the intrastate allocation of OAA funds. This is particularly important in light of the

recent case in Florida, *Meek v. Martinez*, which adds specific direction as to the nature of OAA responsibilities in that regard.

In addition, we have comments about the new act requiring that adding provisions that the area agencies be allowed to waive the requirement to provide legal assistance. This new provision needs direction.

The act contains a new provision that allows this practice, but interested parties in this provision are given the opportunity to come in and testify on questions concerning the appropriateness of waiving the requirement to provide legal assistance. We feel that the regulations should have specific guidelines and parameters that set out the content of those hearings, where they are going to be, how broadly the hearings have to be set and some standards for what is to take place to justify a decision about waiver. That would be very helpful to have in the regs.

As has been mentioned by many others here, we have concerns about service contributions. The AOA proposed regulations continue to blur the question of contributions from beneficiaries towards the cost of services. At least since 1978, the Administration on Aging has sought to have added to the act a statutory requirement that all contractors and providers make provision for voluntary contributions for services. However, Congress has never taken up that position. They have only extended contributions to the question of the nutrition project.

As the Commissioner said earlier in her comments, they have had this position for a long time. We feel that it is time for some congressional clarification to clear up this. It has just lingered on and on. I have been in dialog and in battles with people all over this country about that question and it would be nice to have that resolved.

The final set of issues that I would like to draw your attention to is the question of legal assistance. The proposed regulations adopt LSC restrictions on legislative and administrative advocacy without any of the LSC exceptions. For example, 1821.71(j) of the proposed regulations provides that no funds made available under the act shall be used for lobbying activities intended to influence any decision or activity by a nonjudicial Federal, State or local individual or body. The LSC Act creates exceptions to this prohibition on behalf of lobbying on the request of an official, on behalf of a client or for self-help of the organization.

The way the proposed AOA regs are drawn, they are drawn much broader. We feel that this needs to be looked at and clarified.

Thank you.

[The prepared statement of Mr. Chiplin follows:]

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STATEMENT OF
THE NATIONAL SENIOR CITIZENS LAW CENTER

Prepared by
Alfred J. Chiplin, Jr., Esq.

HEARING BEFORE THE
SUBCOMMITTEE ON HUMAN SERVICES
OF THE
HOUSE SELECT COMMITTEE ON AGING

APRIL 26, 1988; WASHINGTON, D.C.

Mr. Chairman and members of the Committee, the National Senior Citizens Law Center (NSCLC) is a national back-up center that assists Legal Services Corporation (LSC) and Older Americans Act (OAA) funded legal assistance providers across the country in providing legal representation to elderly clients. We appreciate this opportunity to present our views and comments on the Administration on Aging's proposed regulations for implementing the Older Americans Act of 1987, (the Act), P.L. 100-175, 100 Stat. 926, 42 U.S.C. 3001, et seq.

I coordinate the AoA funded activities of our office and provide technical assistance to legal assistance advocates about the requirements of the Act, about prior implementing regulations, and about AoA policies and

guidelines that impact on the delivery of AoA funded legal assistance.

Since 1978, I have focused on problems of legal assistance delivery under the AoA, as a local AoA funded program attorney, as a state support center attorney, and as a national back-up center attorney. As a result of this experience, I have acquired a knowledge of the Act, its development, and its implementation.

Summary of Testimony

The comments and observations of the National Senior Citizens Law Center address only Part 1321 of the AoA proposed regulations. However, to the extent that proposed regulations in Part 1326 (Grants to Indian Tribes for Support and Nutritional Services) and in Part 1328 (Grants for Supportive and Nutritional Services to older Hawaiian Natives) mirror the proposed regulations in Part 1321, particularly language on contributions, the comments below apply. The proposed regulations are found at 53 Fed. Reg. 10107, et seq. (March 29, 1988).

Lack of AoA Direction

Over the years, the AoA has taken a "hands off" approach in its relationship to and guidance of state and area agency on aging functions. Under the notion of allowing "flexibility," the AoA continues its "hands off" approach.

Throughout the proposed regulations, the AoA fails to provide critical direction that could lead to uniformity in the many activities that are common to all state and area agencies on aging. For example, the proposed regulations fail to:

- a.) specify the information needed by the AoA (and the form in which that data should be submitted) to fulfill its data collection responsibilities (§1321.17(e) and 1321.17(f)(9));
- b.) provide critical direction about the nature and scope of outreach and targeting activities (§1321.17(f)(8));

c.) make clear a uniform procedure for public notice and public participation in hearings on state and area plans (§1321.27);

d.) set meaningful standards and parameters for states to use in developing funding formulas for the intrastate allocation of OAA funds (§1321.37); and

e.) establish standards for state and area agencies to use in developing a minimum percentage of funds to be expended on Title III-B supportive services, including legal assistance (no regulation on this point is included in the proposed regulations).

Waiver of the Requirement to Provide Legal Assistance

The Act contains a new provision that allows state agencies on aging to "waive" the requirement to provide legal assistance under certain circumstances (§130 of the Act, amending 42 U.S.C. §3026(b)(2)(c)). Interested parties are to be given notice and opportunity for a hearing when a state agency proposes to grant the request of an area agency on aging for such a waiver. The AoA proposed regulations do not address this vital concern.

Service Contributions

The AoA proposed regulations continue to blur the question of contributions from beneficiaries toward the cost of services. Since the 1978 OAA reauthorization process, the AoA has sought to have added to the Act a statutory requirement that all contractors and providers make provision for "voluntary contributions" to services. However, Congress saw fit only to extend such a provision to the Title III-C services of the Nutrition Project 42 U.S.C. §3027(a)(13)(C)(i) and (ii), and §3027(a)(13)(H)(ii). The 1984 OAA amendments do not extend the contributions requirement beyond Title III-C services, nor do the 1987 amendments.

Nonetheless, the AoA has written its proposed regulations on contributions to apply to all services. It is well settled that agencies can only regulate what the Congress has legislated. See, e.g., *U.S. v. Cartwright*, 411 U.S. 546 (1973). Moreover, deference to an agency's interpretation of a statute it administers is given where that interpretation is within the scope of the statute at issue. *Morton v. Ruiz*, 415 U.S. 119 (1973).

Legal Assistance

The proposed regulations adopt LSC restrictions on legislative and administrative advocacy without any of the

LSC exceptions. For example, §1321.71(j) of the proposed regulations provides:

No funds made available under the Act shall be used for lobbying activities intended to influence any decision or activity by an (sic) non-judicial federal, state or local individual or body.

The LSC Act creates exceptions to the prohibition for lobbying on request of an official, on behalf of a client, or for self-help of the organization. (42 U.S.C. §2996f (a)(5)). The proposed AoA regulations impose a broader restriction without recognizing the three LSC exceptions.

§1321.71(j) states affirmatively that "a provider may use funds provided by private sources" to engage in lobbying activities of a self-help nature with respect to legislation directly affecting the activities of the provider. By contrast, the LSC Act imposes restrictions only on private funds received "for the provision of legal assistance." (42 U.S.C. §2996i(c)). Is it the intent of the proposed regulations to restrict the use of private funds for self-help lobbying?

Unchanged from the 1984 amendments of the Act is the language in §3027(a)(15)(A)(i) which states that OAA funds would be subject to specific LSC restrictions and regulations as determined appropriate by the Commissioner. The AoA proposed regulations contain nothing that demonstrates a need for regulations more restrictive than those of LSC.

Section Analysis

Subpart A. - Introduction

§1321.1 Basis and Purpose of This Part

§1321.1(b) sets forth a precatory comment about the general use of Title III funds. It emphasizes the development or enhancement of comprehensive and coordinated community-based services. It would be more useful if the elements to be included, set out in §1321.1(b), were enumerated in a column. This would highlight the importance of each element.

§1321.3 Definitions

Frail. In the definition of frail, the use of the term, "normal tasks," in describing limits on functional ability is vague. Language that discusses limits on the ability to engage in activities of daily living such as standing, walking, eating, dressing, and bathing would be more helpful.

Official Duties. The reference to the Long-Term Care Ombudsman program should also include local ombudsman functions.

Service Provider. This definition should be expanded to include an individual as well as an entity. There are many service providers who work by themselves, particularly in the context of providing legal assistance.

Subpart B - State Agency Responsibilities**§1321.7 Mission of the State Agency**

This section employs terms such as advocacy, planning, coordination, inter-agency linkages, brokering, monitoring and evaluation, without defining those terms in the state agency context. Each of these terms carries a variety of assumptions. For those who must plan services as well as for those who must carry out such plans, specific guidance is needed. Similarly, terms such as "capacity," and "commitment" should be defined.

There has been a general concern, particularly from area agencies on aging, that the Act should be administered from the "bottom up" rather than from the "top down." We

disagree with this approach. A central problem with the administration of the Act is that the AoA has not exercised the degree of leadership necessary to make services and programs truly viable. There has been little direction about common state and area agency functions, about how to gather data, about the factors to be considered when evaluating need, etc. A strong mission statement, backed up by AoA direction and enforcement, would make the Act truly vital.

§1321.9 Organization and Staffing of the State Agency

Section 1321.9(a) calls for the state agency on aging to serve as the effective visible advocate for the elderly. This, again, highlights the need for more specificity in terms.

§1321.11 State Agency Policies

There should be some enumeration of the types of state agency functions that require policy development, implementation, and enforcement. There should also be room for policy development concerning functions that have not been enumerated. This will insure that a basic corps of policy development has been achieved by state agencies, and will therefore provide the AoA with a more concrete basis for ascertaining state agency compliance.

§1321.13 Advocacy Responsibilities

The language of §1321.13(b) limits advocacy to "comment," and "review." This cuts back on the "proactive" role of state agencies on aging as set forth in

§1321.7(a) (Mission). As brought out in Congressional debate, it was the intent of Congress that the AoA's limited view of advocacy would not prevail.

1321.15 Duration, Format and Effective Date of the State Plan

The AoA should provide uniform guidelines about what information, and in what form, is needed to justify state plan features. This would enhance the process of state plan development and would provide a basis for evaluating state agency performance under the plan.

§1321.17 Content of State Plan

§1321.17(e) addresses the requirements of the Act, 42 U.S.C. §§3027(a)(23) and (29), that state agencies provide AoA with data that show how the needs of minority and rural elderly persons have been met (§131(b) of the Act). More guidance is necessary in order to indicate what information will be collected, the form of the data, as well as the methods of data collection. Without uniform standards, it will be difficult to compare both interstate and intrastate data.

Moreover, guidance from the AoA at this point will facilitate the state and area agency process of developing needs assessment tools. Such tools will give a uniform base to a discussion of priority setting at both the state and national levels.

§1321.17(f)(5) requires state plans to contain provisions for the opportunity to make voluntary

contributions toward the costs of services. As discussed below, under "service contributions," the provision for voluntary contributions is only discussed in the Act in the context of Title III-C services. Making such a provision a feature of the state plan begs the question of voluntariness. Further, placing a general requirement that reaches all supportive services goes further than the language of the Act.

§1321.17(f)(9) requires data collection from area agencies on aging that the state agencies on aging are to compile and forward to the Commissioner as requested. However, this section does not provide guidance about what data is to be collected, nor does it address the form and frequency of data collection.

§1321.19 Amendments to State Plans

This provision does not discuss the publication of proposed state plan amendments, nor does it discuss providing the public with an opportunity to comment or to have a hearing on proposed state plan amendments. While all state plan amendments may not be of a nature that notice and opportunity for public hearings are necessary, guidance as to the nature of those state plan amendments that require notice and opportunity for public hearing is essential.

§1321.21 Submission of the State Plan or Plan

Amendments to The Commissioner for Approval

No comment.

**§1321.23 Notification of State Plan or State Plan
Amendment Approval**

No comment.

§1321.27 Public Participation

This provision states that state agencies shall have a mechanism to obtain and shall consider the views of older persons and the public in developing and administering the State plan. However, the provision does not establish a framework for participation. It does not state how older persons nor the general public is to be notified for purposes of obtaining and considering its views. Further, the provision gives no guidance about the form or manner in which comments and views will be gathered.

Does this provision contemplate public hearings on plan development? If so, will there be a written record of such hearings? How often will such hearings be held? Are they to be held in several locations throughout a state? Is one such hearing sufficient?

§1321.29 Designation of Planning and Service Areas

No comment.

§1321.31 Appeal to the Commissioner

The type of specificity included in this section is necessary throughout the proposed regulations, particularly with respect to data collection and notice of public hearings.

§1321.33 Designation of State Agency

No comment.

§1321.35 Withdraw of Area Agency Designation

No comment

§1321.37 Intrastate Funding Formula

Given the decision in the case, Meek v. Martinez, Civil Action No. 87-1233-CIV-KEHOE (S.D. Fla. 1987), the AoA should give more specific direction for ascertaining the percentage of the population 60 or older in greatest economic or social need with particular attention to low-income minority individuals. That case challenged, among other things, the assumption that being 75 years old or older creates a presumption of frailty. Frailty is generally used an indicator of social need.

§1321.41 Single State Planning and Service Area

No comment.

§1321.43 Interstate Planning and Service Area

No. Comment

§1321.45 Transfer Between Congregate and Home-Delivered Nutrition Service Allotments

No comment.

§1321.47 Statewide Non-Federal Share Requirements

This provision should contain language that sets out standards to be applied in determining area agency matching requirements.

§1321.49 State Agency Maintenance of Effort

For purposes of public participation in state plan development, there should be guidelines for determining when a reduction in effort is justified.

§1321.51 Confidentiality and Disclosure of Information

§1321.51(b), (with reference to the Freedom of Information Act,) should be written in the affirmative.

With respect to state access to ombudsman files, §1321.51(d), access should be limited by the attorney-client privilege, or otherwise treated as privileged. With respect to the attorney-client privilege, in many situations, the ombudsman works closely with LSC and AoA funded attorneys on cases. In those situations, certain aspects of the ombudsman's work should be protected by the attorney-client privilege.

With respect to general ombudsman functions, confidentiality is essential. The threat and reality of reprisals against residents of long term care facilities is well known. In some situations, state or area agency offices may be affiliated with long term care facilities that may be the subject of an Ombudsman investigation. This could lead to access to ombudsman files in inappropriate situations.

As a state or a designated unit of state government will need information about Ombudsman activities for monitoring and other purposes, the proposed regulations should establish a means of facilitating access for limited purposes while protecting confidentiality.

§1321.52 Evaluating Unmet Need

This section requires the collection of important data on need. It should set forth at least an outline of the

type of data to be collected. For example, there should be a reference to the factors to be addressed in assessing unmet need, the methodologies to be employed to verify data, as well as the parameters to be employed in data collection and reporting..

Moreover, the provision notes that the Commissioner will give guidance on data collection. That guidance should be the regulation.

Subpart C - Area Agency Responsibilities

§1321.53 Mission of the Area Agency

§1321.53(b)(5), collaborative decision making, should put forth a basic framework for accomplishing this objective. Is simply having a good board of directors the objective? Are public fora contemplated?

§1321.53(b)(6), targeting, needs definition. How is targeting to be verified?

Establishing that area agencies are to exercise proactive leadership is useful. The state agencies on aging are to assure that this leadership role is carried out. However, the proposed regulations do not establish parameters for carrying out these functions. (See comment under §1321.7)

§1321.55 Organization and Staffing of the Area Agency

No comment.

§1321.57 Area Agency Council

There should be guidance about the size of such councils. Further, there should be guidance about how often

they are to meet, and the nature and extent of public participation.

**§1321.59 Submission of an Area Plan and Plan
Amendments to the State for Approval**

This section references the inclusion of approval policies in a state policy manual as provided in §1321.17(f)(7). However, that section does not reference developing a policy manual as such. It would be useful to all parties if such a manual is developed and made available to providers and contractors, area agencies on aging, and the general public.

§1321.61 Advocacy Responsibilities of the Area Agency
See comment under §1321.13.

Subpart D - Service Requirements

§1321.63 Purpose of Service Allotments Under Title III
No comment.

**§1321.65 Responsibilities of Service Providers Under
Area Plans**

§1321.65(c), opportunity to contribute to costs, is problematic. As stated elsewhere in these comments, only §3027(a)(13)(C), the Nutrition Project, contains a provision for contributions from beneficiaries of the Act. This provision was not expanded in the 1987 amendments. See further discussion below, §1321.67.

§1321.67 Service Contributions

The AoA proposed regulations continue to blur the question of contributions from beneficiaries. Since at

least the 1978 OAA reauthorization process, the AoA has sought to have added to the Act a statutory requirement that all contractors and providers make provision for "voluntary contributions" to services. However, Congress saw fit only to extend such a provision to the Title III-C services of the Nutrition Project 42 U.S.C. §3027(a)(13)(C)(i) and (ii) and §3027(a)(13)(H)(ii). The 1987 OAA amendments do not extend the contributions requirement beyond Title III-C services.

Nonetheless, the AoA has written its proposed regulations on contributions to apply to all services. It is well settled that agencies can only regulate what the Congress has legislated. See, e.g., U.S. v. Cartwright, 411 U.S. 546 (1973). Moreover, deference to an agency's interpretation of a statute it administers is to be given where that interpretation is within the scope of the statute at issue. Morton v. Ruiz, 415 U.S. 119 (1973). Note, however, Kay v. FCC, 493 F.2d 638, 646-47 (D.C. Cir. 1970). Kay holds that since Congress knows of the agency's interpretation and did not correct that interpretation, the agency's view of the statute is to be given deference. Does Congress have to legislate everytime an agency offers and erroneous interpretation of a federal statute? Kay would say that it does not. Nonetheless, the proposed regulations continue the agency's interpretation. Congressional clarification is the more expedient solution. Litigating

this issue would be costly and may lead to differing interpretations from circuit to circuit.

§1321.69 Service Priority to the Frail, Homebound, or Isolated Elderly

The terms frail, homebound and Isolated need to be defined. Moreover, the nature of the priority that these groups are to receive should be made specific.

§1321.71 Legal Assistance

The proposed regulations adopt LSC restrictions on legislative and administrative advocacy without any of the LSC exceptions. For example, §1321.71(j) of the proposed regulations provides:

No funds made available under the Act shall be used for lobbying activities intended to influence any decision or activity by an (sic) non-judicial federal, state or local individual or body.

The LSC Act creates exceptions to the prohibition for lobbying on request of an official, on behalf of a client, or for self-help of the organization. (42 U.S.C.

§2996f(a)(5)) The proposed AoA regulations impose a broader restriction without recognizing the three LSC exceptions.

§1321.71(j) states affirmatively that "a provider may use funds provided by private sources" to engage in lobbying activities of a self-help nature with respect to legislation directly affecting the activities of the provider. By contrast, the LSC Act imposes restrictions only on private funds received "for the provision of legal assistance." (42 U.S.C. §2996i(e)(5)). Is it the intent of the proposed

regulations to restrict the use of private funds for self-help lobbying?

Unchanged from the 1984 amendments of the Act is the language in §3027(a)(15)(A)(i) which states that OAA funds would be subject to specific LSC restrictions and regulations as determined appropriate by the Commissioner. The AoA proposed regulations contain nothing that demonstrates a need for regulations more restrictive than those of LSC.

§1321.73 Grant Related Income Under Title III-C

No comment.

§1321.75 Licenses and Safety

No comment.

Subpart E - Hearing Procedure for State Agencies

§1321.77 Scope

The kind of detail included in this section could form the basis for the direction that the AoA could give to state and area agencies as they develop administrative hearing procedures.

§1321.79 When a Decision is Effective

No comment.

§1321.81 How the State May Appeal

No comment.

§1321.83 How the Commissioner May Reallot the State's Withheld Payments

No comment.

Mr. DOWNEY. Thank you, Mr. Chiplin.
Ms. Hart.

STATEMENT OF ANNE HART

Ms. HART. Good morning. I am Anne Hart. I am the Long-Term Care Ombudsman for the District of Columbia and I am here today representing the National Association of State Ombudsman Programs. So my comments represent our concerns as an association regarding the proposed Older Americans Act regulations.

The major problem that we as State ombudsman programs have with these proposed regulations has already been addressed this morning. It is Section 1321.51(d), which relates to confidentiality and disclosure of complaint information.

As written, this regulation negates the clear legislative intent of the Older Americans Act. The act itself states that the identity of any complainant or any resident will not be disclosed without the written consent of that individual or upon court order.

The regulation, however, allows the Director of the State Unit on Aging or other legitimately authorized superior of the State Ombudsman to have access to the files of the State Ombudsman. Those files contain identities of complainants.

This regulation thus weakens the law; it loosens the protections for the individual resident and it jeopardizes a very fundamental principle of the ombudsman program, which is guaranteed confidentiality.

As the State Ombudsman for the District of Columbia, I and my staff are in nursing homes and boarding homes in this city daily. The most common fear that we hear from residents of these facilities is the fear of retaliation. They are scared to death that the staff of the facility will somehow take it out on them if they complain. I can personally verify that this sort of retaliation does occur.

Residents who are known to complain are sometimes left sitting for a long time on the toilet; they are the last to be served when the food trays come; sometimes their tray is left on top of the cart and they are not served food at all; they are scolded by staff when they speak out, and in some cases, there has been an attempt to discharge them or evict them from the nursing home because they are labeled as a troublemaker or as a complainer.

Thankfully, Congress has been very sensitive to this problem and the Older Americans Act itself has very strong protective language that shields the identity of a complainant and only allows that identity to be disclosed by the order of a court or by the permission of the individual. We believe that this is as it should be.

Although only about 10 percent of the 900-some complaints that we investigate in the District of Columbia were lodged by complainants who requested anonymity, to those people who requested it, it was very important to them. In fact, it is usually the only condition under which they will speak to us at all.

Confidentiality is central to the long-care ombudsman program. As ombudsmen, we honestly can promise complainants that they can remain completely confidential, that they control the progress of their case and we are guided by their wishes.

I want to be very clear that we as ombudsmen are not objecting to supervision of our work performance. We are not objecting to oversight or quality control in the ombudsman program. We are, however, objecting to the broad scope of this particular section and its dramatic departure from the law itself.

According to a recent count, approximately 30 percent of State ombudsman programs and 35 percent of local ombudsman programs are physically located outside of the State unit on aging or area agency on aging. By virtue of the locations of some of these programs, it would be a conflict of interest to then allow the director of the State unit on aging or other legitimately authorized superior access to the ombudsman file.

For example, the State Unit on Aging in the District of Columbia holds title to a nursing home. It would be highly inappropriate, and I think a clear conflict of interest, to allow that State unit on aging director to have access to my files. She would then be able to find out who has been complaining about her nursing home. I could not ensure the complainant's confidentiality, and thus, a very essential protection would be lost.

We do not want to prevent normal oversight of ombudsman program activities, but we do want to protect the identity of the people who complain to us. We are seriously concerned that this section, as it is currently written, would not allow us to do that and, in fact, would have a very chilling effect on our ability to serve residents in long-term care facilities. Consequently, the National Association of State Ombudsman Programs is asking that you please see that this section be removed.

Thank you.

Mr. DOWNEY. Thank you, Ms. Hart.

Ms. Hommel.

STATEMENT OF PENELOPE HOMMEL

Ms. HOMMEL. Thank you, Mr. Chairman.

My name is Penelope Hommel. I am Executive Director of the Center for Social Gerontology in Ann Arbor, Michigan, and our center serves as a national support center in law and aging with funding from the Administration on Aging.

Our general focus is on helping the States and legal providers develop high-quality, cost-efficient legal programs that will vigorously pursue rights and entitlements of older persons. A specific area of focus is on protecting rights of the most frail and vulnerable among the elderly, those at risk of guardianship and those in long-term care institutions.

Thus, my comments today are directed at the sections of the proposed regulations that affect legal assistance and the State offices of the Long-Term Care Ombudsman.

Let me first talk to a set of related issues where further regulatory clarification would be helpful. These are issues that affect both the legal and ombudsman services.

Those are that of targeting those in greatest social and economic need without the use of a means test and the provisions regarding voluntary contributions for services.

Turning first to targeting, a very useful requirement in the proposed regulations for service providers is that the providers must specify how they intend to satisfy the service needs of low-income minority individuals in the area served. However, given this requirement, it seems that both State and area agencies also have a responsibility of providing assistance to the service providers on how to accomplish such targeting without the use of a means test. This shared responsibility should, I believe, be acknowledged in the regulations.

With regard to contributions for services, which has already been addressed a great deal this morning, the proposed regulations at 1321.67 suggest that service providers may develop a suggested contribution schedule for services, and in so doing, shall consider the income ranges of older persons in the community.

While client contributions are one way of helping to assure that limited Title III resources are available to serve those who cannot afford to contribute, substantial caution is needed so that "suggested contribution schedule" is not seen as a sliding-fee scale, with the result being that the indirect application of a means test will exist.

In the areas of ombudsman legal services, perhaps more than any other Title III services, providing older clients the opportunity to contribute to the cost of service must be done very carefully. I feel that the regulations need expansion to specify that there should be no coercion, direct or indirect, in the way in which the opportunities to contribute are presented to clients. It should be made very clear that future services will not be affected in any way by a contribution or a lack thereof.

Also, because legal and ombudsman services continue over time, the contribution issue should not be raised until the service has been completed so as to not dissuade a client from going forward with a case.

Specifically with respect to the Office of the Long-Term Care Ombudsman, I feel that more interpretation and clarification is needed, given the magnitude of the statutory changes in this area. The 1987 amendments brought changes that are complex and have immense implications for State policy. The act sets forth at least 10 major new responsibilities of State agencies, ranging from making available adequate legal counsel to the ombudsman program to ensuring against all conflicts of interest.

It seems that more guidance is needed than is given in the proposed regulations under Section 1321.9 on how States should proceed to develop policies governing the Office of the State Long-Term Care Ombudsman.

I would also here like to mention something that Anne Hart just mentioned, which is subsection (D) of 1321.51, dealing with confidentiality. The Older Americans Act states, "The State agency will establish procedures to assure that any files maintained by the ombudsman program shall be disclosed only at the discretion of the ombudsman having authority over the disposition of such files."

The proposed regulations would broaden access to files to also include the Director of the State agency or other legitimately authorized superior of the State Ombudsman and of representatives of the Ombudsman's Office, as specified in State policies. The stated pur-

pose in the proposed regulations is to allow the State agency to carry out its responsibilities for the ombudsman program.

As currently proposed, however, the regulations would be open to challenge in that they transfer the discretion given exclusively to the ombudsman in the act regarding the release of files and information.

Specifically now, with respect to legal services, I would like to begin with 1321.51, which is a continuation of the confidentiality issue. I am very pleased to see the expansion of that section from the previous regulations, and in particular, the highlighting of the statutory requirement that State or area agencies may not require a provider to reveal any information protected by attorney/client privilege.

I feel, however, that this section needs further clarification and expansion. First, it would be helpful if the regulations clarified that the statutory term "attorney/client privilege" is not intended to be limited to the narrow courtroom evidentiary privilege. The regulations should make clear that the statutory language protects all confidences a lawyer is professionally bound by professional rules of conduct not to disclose.

Since the issue of what information is confidential has often been a point of tension between legal assistance providers and area agencies, some further delineation of what information is protected would be useful. In particular, the statement that names, addresses and telephone numbers of clients served with Title III legal assistance funds are confidential would be helpful and would reflect the legislative history.

Turning now to the proposed regulation, 1321.71, which deals solely with legal assistance, I wish to state first that the intent, as stated in the introduction to the regulations as simplification by limiting is laudable. However, if the regulations are too limited, this could cause confusion and challenges and might inhibit the provision of legal assistance to older persons.

The introduction of the proposed regulations indicates that their intent is the same as that of the Legal Services Corporation Act regulations without the same level of detail. Given the long history of those Legal Services Corporation regulations and their continual reinterpretation, particularly restrictions on political lobbying activities, it is probably best to include in their entirety those segments that the Commissioner deems appropriate.

Sections 1321.71(h), (i), (j) and (k) address prohibited political activities and lobbying activities. This part of the regulations has been summarized from the LSC regulations. As I mentioned, while this is a laudable goal, this particular area does not lend itself to abbreviated discussion. The restrictions in the LSC regulations have been the source of ongoing controversy and challenges have resulted in numerous redrafts and reinterpretations of those restrictions. They were originally adopted because of the feeling of the administration and some members of Congress that there was abuse occurring among LSC attorneys. Those of us working in law and aging at the national level have seen no evidence to indicate that abusive political activities are occurring in the Title III network.

Thus, I would suggest that there may be no need to include political and lobbying restrictions in the regulations and that they should be deleted in their entirety, rather than condensed.

Finally, I would raise the question of why legal assistance providers are singled out for specific restrictions on political activities while there are no similar regulations for other Title III service providers, such as home health, information and referral, and nutrition providers. If such regulations are deemed necessary, they should apply equally to all categories of service providers.

Thank you.

[The prepared statement of Ms. Hommel follows:]

Prepared Statement of Penelope A. Hommel

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to appear before you to address the important matter of proposed regulations for the 1987 Amendments to the Older Americans Act. My name is Penelope Hommel and I am Executive Director of the The Center for Social Gerontology in Ann Arbor, Michigan. The Center serves as a National Support Center in Law and Aging with funding from the Administration on Aging. Our general focus is on helping states, area agencies and legal providers develop high-quality, cost-efficient legal programs that will vigorously pursue rights and entitlements of older persons. A specific area of focus is on protecting rights of the most frail and vulnerable among the elderly -- those at risk of guardianship and those in long-term-care institutions. Thus my comments are directed primarily at the sections of the proposed regulations that affect legal assistance and the State Offices of the Long-Term-Care Ombudsman.

I. General Comments

I would like to begin with one general comment regarding a minor word change that appears throughout the proposed regulations, but which could have important ramifications -- that is the addition of the term "community based" to describe the comprehensive and coordinated Title III service system. This is a change from the language of the Act itself and from the language used in previous regulations. While it is clearly important to emphasize assistance that will maintain older persons in their own homes and in the community, I fear there may be unintended negative consequences from prefacing "comprehensive and coordinated service system" with "community based" throughout the regulations. The term "community based" is generally interpreted in the aging network as meaning services to maintain persons in their homes and to prevent institutionalization. A "comprehensive and coordinated service system" may seek to maximize "community based" services, but must also include services for the

institutionalized. Thus the regulations' use of the term "community based comprehensive and coordinated service system" may result in state and area agencies supporting and promoting in-home services at the expense of providing the "continuum of care for vulnerable elderly" (many of whom are institutionalized) called for in Section 301(a)(3) of the Older Americans Act. At the same time, I wish to commend the Commissioner on Aging for an important addition to the regulations at 1321.53 (Mission of the Area Agency). 1321.53(b)(6) specifies that each area agency's comprehensive and coordinated community based system shall "offer special help or targeted resources for the most vulnerable older persons, those in danger of losing their independence; . . ." Singling this group out for targeted services can go a long way toward avoiding unnecessary guardianship or institutionalization, and I would suggest adding to the end of (b)(6) so that it reads ". . . those in danger of losing their independence, particularly through guardianship or institutionalization."

II. Comments Addressing both Legal Assistance and Ombudsman Services

A set of related issues where further clarification would be helpful is (1) that of targeting those in greatest economic and social need without use of a "means test;" and (2) the provisions regarding voluntary contributions for services. These requirements are dealt with at 1321.17 (Content of State Plan), 1321.61 (Advocacy Responsibilities of the Area Agency), 1321.65 (Responsibilities of Service Providers Under Area Plans), and 1321.67 (Service Contributions).

Turning first to targeting, a very useful requirement in the proposed regulations for service providers (i.e. 1321.65(b)) is that the providers specify how they intend to satisfy the service needs of low-income minority individuals in the area served, including attempting to provide services to low-income minority individuals at least in proportion to the number of low-income minority older persons in the population served by the provider. Given this requirement, it seems that both state and area agencies also have a responsibility of providing assistance to providers on how to accomplish such "targeting" effectively

without the use of a means test. This shared responsibility should be acknowledged in the regulations.

With regard to contributions for services, the proposed regulations at 1321.67 suggest that service providers may develop a suggested contribution schedule for services provided, and in so doing shall consider the income ranges of older persons in the community. While client contributions are very important and are one way of helping to assure that limited Title III resources are available to serve those who cannot afford to contribute, substantial caution is needed so that a "suggested contribution schedule" is not seen as a "sliding fee scale" -- with the result being an indirect application of a means test. In the areas of ombudsman and legal services, perhaps more than in other Title III service areas, providing older clients the opportunity to contribute voluntarily to the cost of service must be done very carefully. I feel the regulations need expansion to specify that there should be no coercion -- direct or indirect -- in the way in which the opportunity to contribute is presented to clients. It should be made clear that future services will not be affected in any way by a contribution or lack thereof for current services. Also, because legal and ombudsman services continue over time in many cases, the contribution issue should not be raised until the service has been completed, so as not to dissuade a client from going forward with a case.

III. Comments Specific to the State Office of the Ombudsman

With respect to the "office of the long term care ombudsman," I feel that more interpretation and clarification is needed, given the magnitude of statutory changes in this area. The 1987 Amendments brought changes that are complex and have immense implications for state policy. The Act now requires that State agencies must:

- (1) establish procedures for appropriate access to facilities and patients' records;
- (2) establish procedures to insure that records and complainants' identities are kept confidential;
- (3) establish statewide uniform reporting;
- (4) ensure against conflicts of interest interfering with full investigation and resolution of complaints;
- (5) make available to the "Office" adequate legal counsel;

- (6) ensure legal representation for any "Office" representative against whom a law suit or other action is brought;
- (7) ensure the "Office" has ability to pursue administrative and legal remedies on behalf of residents;
- (8) require the "Office" to provide specified training;
- (9) prohibit any representative to investigate any complaint unless the person has received required training and been approved by the state ombudsman; and
- (10) require the "Office" to (a) analyze and monitor Federal, State, and local laws, and policies, etc. and recommend appropriate changes; (b) prepare an annual report on problems and complaints, and provide legislative and policy recommendations to solve them; (c) provide information and recommendations to public agencies, legislators, and others regarding problems; and (d) coordinate with protection and advocacy systems for individuals with developmental disabilities and mental illness.

Given the Center's role as a national legal support program, we have already received numerous requests from states for assistance in interpreting the meaning and implications of these statutory requirements for state policy. To give two small examples, we have attempted to address such questions as:

- (1) What is the meaning of legal counsel and representation for any "office" representative? (What will it mean for Title III legal providers; what will it mean for state attorneys general, particularly if the ombudsman and another state agency are on opposite sides of a case; who will provide legal counsel for local ombudsmen who are not state employees; if the attorney general is responsible for representing ombudsmen, will (s)he want control over how the program and ombudsmen operate; will state and/or local programs need malpractice insurance to cover legal costs; etc.)
- (2) What is the line of authority and chain of command, given that all designated local entities are now part of the "office" of the ombudsman? (If a AAA contracts with a local agency (e.g. a Title III legal provider) to provide ombudsman services, how much authority does the state ombudsman, the AAA, and/or the agency director have over such things as the contract, the services provided, the monitoring and evaluation of services, the hiring and firing of staff, the direct supervision of staff, etc.; what might this mean for AAA or provider agency willingness to fund or enter into a contract to provide local ombudsman services, etc.)

While it clearly is not possible or desirable for the Commissioner to try and address these detailed questions in the regulations, it seems that more guidance is needed than is given in the proposed regulations under Section 1321.9 on how states should proceed to develop policies governing the "Office of the state long term care ombudsman."

Here I would also like to comment on proposed regulation Subsection (d) of 1321.51 (which also deals with ombudsmen). Section 307 (a)(12)(D) of the Act states:

"The State agency will establish procedures to assure that any files maintained by the ombudsman program shall be disclosed only at the discretion of the ombudsman having authority over the disposition of such files, except that the identity of any complainant or resident of a long-term care facility shall not be disclosed by such ombudsman unless -- (i) such complainant or resident, or the individual's legal representative, consents in writing to such disclosure; or (ii) such disclosure is required by court order; . . . " The proposed regulations would broaden access to files to also include "the director of the State agency, or other legitimately authorized superior of the State ombudsman and of representatives of the Ombudsman Office as specified in state policies." Arguably, this access would not require patient consent or a court order to release client identities to State agency personnel. The proposed regulations state that this is to allow the state agency "to carry out the State's responsibilities for the ombudsman program." As currently proposed, the regulations might be open to challenge in that they transfer the discretion given exclusively to the Ombudsmen in the Act regarding the release of files and information. If Congress intended this State agency access to information it is unclear why Section 307(12) of the Act does not specifically state this. If Congress did not intend the release of this information -- as a literal reading of the Act would suggest -- then this regulation may be in conflict with the Act. While the State agencies' responsibilities towards the ombudsmen are important, it seems that restrictions on access to client identities and files should take precedence given the serious potential for retaliation against complainants if their identities were available to persons other than the ombudsman. Here I might also note that the important and delicate issues presented here (such as how can a program be monitored without agency access to client names and files) have been struggled with in the area of legal assistance and have been resolved to a large extent. Such experience might be transferable to Ombudsman programs.

IV. Comments Specific to Legal Assistance

Turning to legal services, I would like to begin with Sec. 1321.51 (Confidentiality and Disclosure of Information). I am very pleased to see the expansion of that section from the previous regulations, in particular the highlighting of the statutory requirement that state or area agencies may not require a provider of legal assistance to reveal any information that is protected by "attorney client privilege." I feel however, that this section needs some further clarification and expansion.

First, it would be helpful if the regulations clarified that the statutory term "attorney-client privilege" is not intended to be limited to the narrow courtroom evidentiary privilege, but encompasses all confidences communicated by an elder client to his or her lawyer, whether or not a court could compel disclosure. While the evidentiary rule of privilege is commonly considered as the same as the professional rule of confidentiality -- in reality, it is a narrower rule than confidentiality. Lawyers are ethically required not to voluntarily disclose to anyone secrets and confidences about a client even if a court could ultimately compel disclosure.

Thus, the professional obligations of a lawyer to protect the confidentiality of a client are broader, and more all encompassing, than the common law rules of evidence that provide lawyers a courtroom privilege against testifying about the client. The regulations should make clear that the statutory language protects all confidences a lawyer is professionally bound by rules of professional conduct not to disclose. Any other interpretation could permit state or area agencies to condition funding upon a lawyer's violating his or her professional obligation to his or her client.

The regulations in 1321.51(a) also assume state and area agencies can seek client consent to disclosure of otherwise protected information. Assuming that Congress did not wish to preclude such waivers, it is hoped that they will be sought by state and area agencies only in exceptional situations and not as a commonplace matter.

In addition, under 1321.51(a), any client consent to disclosure should be in writing. Thus, the word "written" should be added to the part stating that no information about an older person is to be disclosed by the provider or agency in a form that identifies the person without the informed consent of the person or of his or her legal representative. Continuing in that same sentence, the word monitoring should be replaced with "auditing" to be consistent with Section 313 of the Act which addresses access to information and records for audit purposes.

Since the issue of what information is confidential has often been a point of tension between legal assistance providers and area agencies some further delineation in subsection 1321.51 (c) of what information is protected by "attorney client privilege" would be useful. In particular, a statement that names, addresses and telephone numbers of clients served with Title III legal assistance funds are confidential would be helpful. Such an addition would reflect the legislative history of the "attorney client privilege" provision of the Act. In this regard the Report of the House Committee on Education and Labor which accompanies the House of Representatives version of the 1987 Amendments to the Act states:

The bill provides that States and state agencies on aging may not require legal assistance providers under the Act to reveal any information that is protected by the attorney-client privilege. Agencies would not be prohibited from collecting any information they need for the purposes of evaluation, planning, or needs assessment. That kind of information may be readily obtained without the disclosure of the names and addresses of clients served with Title III funds.

The Committee's intent in including the new confidentiality provisions is to clarify that names, addresses and telephone numbers of clients served with Older Americans Act funds will remain privileged information. The Committee understands that some legal assistance providers may be reluctant to contract with area agencies without this assurance. Many older individuals might be hesitant to ask for the legal advice and counsel they need if they thought others would have access to their identifying information. This assurance of confidentiality makes it easier for older persons to seek the assistance they need to resolve their legal problems, and makes it easier for legal assistance providers

to serve them in good faith. H. REP. No. 97, 100th Cong.,
1st Sess. 12 (1987).

Turning now to proposed regulation 1321.71 which deals solely with legal assistance, I wish to state first that the intent of simplification by limiting this regulation is laudable. However, if the regulations are too limited, this could cause confusion and challenges and might inhibit the provision of legal assistance to older persons. The introduction to the proposed regulations indicates that their intent is the same as that of the Legal Services Corporation Act regulations without the same level of detail. Given the long history of those LSC regulations, and their continual reinterpretation, particularly of restrictions on political and lobbying activities, it is probably best to include in their entirety those segments that the Commissioner deems appropriate. This seems to be what is intended in the Older Americans Act which states that any recipient of funds for legal assistance will be subject to specific restrictions and regulations promulgated under the Legal Services Corporation Act as determined appropriate by the Commissioner. It appears that Congress intended that they not be summarized, but that specific LSC regulations be adopted as written under the LSC Act or not adopted at all, at the Commissioner's discretion.

The reordering of the paragraphs in Section 1321.71 is helpful, particularly in that it places at the beginning the caveat that "(b) Nothing in this section is intended to prohibit any attorney from providing any form of legal assistance to an eligible client, or to interfere with the fulfillment of any attorney's professional responsibilities to a client."

In light of the statutory changes in the ombudsman provisions and based on the questions our Center has received thus far, I would suggest that some clarification is needed in subsection 1321.71 (c) which describes the legal provider with whom area agencies must contract. Section (c)(3) states that the provider must demonstrate the capacity to provide support to other advocacy efforts, for example, the long-term care ombudsman program. The question raised with us is whether the Title III legal provider

should be expected to provide legal counsel and representation for local ombudsmen if they are sued or wish to initiate a suit. It is our feeling that given the limited resources of most Title III legal programs, those resources should be used to represent older residents of long term care facilities and to assist ombudsmen in protecting resident rights, but that they should not be used to represent the ombudsman. The only exception to this general rule would be where the Ombudsman is intervening in a lawsuit to protect the rights of specific nursing home residents. Here it would be permissible for a Title III legal provider to represent the Ombudsman.

Section 1321.71(g) deals with fee-generating cases. As a prefatory remark, I would note that most Title III programs are too understaffed to look for fee generating cases which are the "bread and butter" of the private bar. Legal providers also recognize that were they to routinely accept fee generating cases in competition with the private bar, they would soon alienate that bar. Therefore, it is only under very unusual circumstances that a Title III program would accept a fee generating case. Proposed Section 1321.7(g) generally prohibits the acceptance of fee generating cases with a few exceptions. An improvement in this subsection over past regulations is that it continues to allow acceptance of fee generating cases in emergency circumstances, but no longer requires possible referral at a later date which could disrupt progress in the case. I would suggest however that this is also an area where abbreviation of the regulations could cause confusion. Some important aspects of determining whether other adequate representation is unavailable have been deleted and should be reinserted. For example, the LSC regulations indicate that "adequate representation" is deemed unavailable when the case has been rejected by the local lawyer referral service or by two private attorneys, or neither the referral service nor a lawyer will consider the case without payment of a consultation fee. These "clear cut" tests contained in the current regulations enable a provider and an area agency to know whether or not fee generating cases are acceptable. Deletion of these "tests" in the proposed regulations removes clear cut guidance needed by providers and area agencies.

Sections 1321.71(h), (i), (j), and (k) address prohibited political activities, lobbying activities, demonstrations, and payment of dues to organizations engaged in prohibited political activities. This part of the regulations has been summarized to fit on approximately one half page. The LSC regulations on these topics take up four pages and the previous Older Americans Act regulations were over two pages long. While it is a laudable goal to make the regulations shorter and less burdensome, this particular area does not lend itself to abbreviated discussion. The restrictions in the LSC regulations have been the source of ongoing controversy; and challenges have resulted in numerous redrafts and reinterpretations of those restrictions. They were originally adopted to reflect language in LSC appropriations bills and resulted from the feeling of the Administration and some members of Congress that there was abuse occurring among LSC attorneys.

The reason that these restrictions seem to have been adopted for Title III attorneys is because they are lawyers and are often affiliated with Legal Services Corporation Offices. Those of us working in law and aging at a national level, have seen no evidence to indicate that abusive political activities are occurring in the Title III legal network. Thus, I would suggest that there may be no need to include political and lobbying restrictions in the regulations, and that they should be deleted in their entirety rather than condensed.

It is also submitted that these regulations are duplicative and not necessary to limit abusive political activities. I would point out that there are other regulations to guide the conduct of most legal providers in this area. If the provider is a non-profit organization, they are bound by OMB Circular A122; and if they are grantees of the Legal Services Corporation, they are bound by the detailed LSC regulations.

Finally, I would raise the question why legal assistance providers are singled out for specific restrictions on political activities, while there are no similar regulations for other Title III service providers such as home health, information and referral, and nutrition. If such regulations are deemed necessary, these restrictions should apply to all categories of service providers.

One final point regarding the legal assistance regulations -- some guidance regarding the role and responsibilities of the state agency and state legal services developer would be helpful. As a national support center, we receive numerous calls asking about the role of the developer, and we are aware that the scope and nature of this role differs substantially from state to state. The language of the Act is vague stating only that the state plan shall "provide assurances that each State will assign personnel to provide State leadership in developing legal assistance programs for older individuals throughout the State." Our experience indicates that guidance is needed in the regulations as to what is involved in providing such state leadership.

On behalf of The Center for Social Gerontology, I thank the Chairman and the subcommittee for inviting us to present our views and hope they will be of assistance.

Respectfully submitted,

Penelope Hommel, Executive Director
The Center for Social Gerontology
117 N. First Street, Suite 204
Ann Arbor, Michigan 48104

Mr. DOWNEY. Thank you, Ms. Hommel.
Mr. Cook.

STATEMENT OF CURTIS COOK

Mr. COOK. Thank you, Mr. Chairman. I am Curtis Cook, the Executive Director with the National Indian Council on Aging.

Members of the Subcommittee on Human Services, I want to say that I appreciate very much this privilege to be here with you today and present testimony on the proposed rulemaking of the Administration on Aging and its impact upon the nearly 200,000 Indian and Alaskan Native elders in our country.

The National Indian Council on Aging was formed in 1976 for the purpose of advocating for and conducting research on the needs of our nation's Indian and Alaskan Native elders. As an advocacy organization, we have some very special concerns and a special interest in the Older Americans Act and its implementation, especially as regards its effect upon Indian and Alaskan Native elders who have consistently been shown to be in great economic and social need.

I wish to begin my comments by saying that we commend the Administration on Aging for developing such detailed regulations, but we find within those regulations some serious omissions; we find some excesses and we find some inappropriate regulations with respect to Indian, Alaskan Native and Hawaiian Native populations.

Under the omissions, we note that there is a serious omission of any reference whatsoever to the Associate Commissioner for American Indian, Alaska Native and Hawaiian Native Aging. While we recognize that this position is not established by Titles III or VI, the focus of these regulations, but rather, by Title II, we submit that the Associate Commissioner, as authorized by Congress in its passage of the act, must exercise substantial authority and administrative responsibility with regard to programs serving Indian and Alaskan and Native Hawaiian elders, including Titles III and VI, and including, also, the coordination issues related to the two titles.

Therefore, the function of this Associate Commissioner, his role, his responsibilities, and his relationship within the Administration on Aging should be clearly spelled out in the regulations and reflected in accordance with the requirements of the mandates of the law. This omission raises serious questions in the minds of those of us who advocate for Indian, Alaskan Native and Hawaiian Native elders.

I will summarize those questions by simply saying: What level of authority will this Associate Commissioner have if he is not even referred to in the regulations for Title III and VI? Will this Associate Commissioner be an Associate Commissioner in name only and will his or her responsibilities be limited in such a way as to make the title meaningless and to have no real authority to be an effective and visible advocate for Indian, Alaskan Native and Hawaiian Native elders?

If the answers to these and other related questions are not clearly reflective of the intent that Congress had and the long-held hopes of the advocates for Indian elders in requesting that there be

established an Indian desk within the Administration on Aging and now a desk to represent the interests of the Alaskan Native and Hawaiian Native populations as well, then the Indians, Alaskan and Native Hawaiians have lost again. But more importantly, the Administration on Aging has overlooked or side-stepped the issue.

A second omission is the absence of any mention of the Inter-agency Policy Task Force, a task force which was required by Congress to be formed to investigate the policies and the procedures used by the various service providers in Federal agencies that have an interest in the needs of Indian people. This policy is nowhere referred to in the regulations. This Policy Task Force is nowhere referred to in the regulations and we feel that this is a serious omission.

Furthermore, the proposed regulations also do not include any reference to the manner in which Title III and Title IV services should be coordinated. Under the new provisions, which allow for dual eligibility of Indian, Alaskan Native and Hawaiian Native elders for the services provided under the two titles, in a fashion which is considered to be complimentary, that is, certain services are not able to be provided under Title VI by certain grantees because of the limitation in funding. Title III resources were freed up by action of the Congress in the reauthorization of the Older Americans Act and made available to complement those services which could not be provided by Title VI programs.

It is our view that these three major provisions of the amended Older Americans Act, the Associate Commissioner, the Task Force and the coordination issues are important and essential provisions to assure the improvement of services to older American Indians, Alaskan Natives and Hawaiian Natives.

As such, they should not be omitted from the regulations designed to implement the requirements of the act.

There were also some fundamental changes in Titles II, IV and V, and we wonder if there will be any regulations coming forth from the Administration on Aging to reflect those fundamental changes in the act.

A fourth omission in the regulations is the failure to emphasize, as in the act, the fact that continued funding for area agencies on aging is contingent on their ability to demonstrate that they have conducted outreach and informational efforts. Assurances are there, yes, written assurances prior to the authorization of grants to these area agencies, however, the act requires that these area agencies on aging also demonstrate that they have conducted sufficient efforts to outreach and inform the minority and low-income populations within their planning and service areas.

We also see that there are some excesses within the regulations. There are certain proposed regulations which go beyond the authority and the mandates of the law. In each case, these proposed regulations place unnecessary burdens upon Indian tribes and tribal organizations, Alaskan Native villages and corporations and Hawaiian Native organizations, and they unfairly discriminate against the elders of these three ethnic groups in the sense that there is no such requirement imposed upon the non-Indian or non-Hawaiian grantees and the area agencies on aging.

These excessive requirements are the requirement under Parts 1326.15 and 1328.15, that would permit the provision of nutrition services to nonelderly handicapped and disabled Indians or Native Hawaiians only if they reside in housing facilities occupied primarily by the elderly at which congregate nutrition services are provided. This goes far beyond the mandates of the act which provides that these disabled, nonelderly persons may accompany another eligible elderly person to the meal site and receive services. We believe this is a misinterpretation of the law and goes beyond what was intended.

A second excess is the prohibition in Parts 1326.11 and 1328.11 against supplantation. This is a requirement which is not imposed on the non-Indian or non-Hawaiian grantees in the regulations and should, therefore, be deleted from the Indian and Hawaiian requirements. The requirement, is excessive and discriminatory in the view of those of us who were informed regarding the highly unlikely occurrence that any Indian, Alaskan Native or Hawaiian Native elder would ever receive too much in the way of services.

A third excess is the allowance that the Commissioner may require of Indian tribal or Hawaiian Native organizations and applicants' objectives which are beyond or in addition to those set forth in the act. The same requirement does not exist for other grantees under the act and we believe this to be discriminatory.

There are certain inappropriate requirements, also, that I would like to mention. We find especially objectionable the idea of developing a "suggested contribution schedule of services." In the case of Indian elders and Alaskan Native elders, this requirement reflects a lack of understanding on the part of AOA of the kinds of social pressures to which an Indian elder may be subjected when such suggestions are made. Suggestions have a way of becoming requirements and elders, therefore, find themselves socially and economically, whether by intent or whether by accident, excluded from the ability to participate in services.

The general tone of the regulations for Title III, placing significantly increased authority and power in the hands of the State, is another issue which is inappropriate and problematical with regard to Indian tribes or tribal organizations which may seek grants under area agencies or which may wish to form their own area agencies on aging.

That issue is the very essence of historic State and tribal relationships which have repeatedly highlighted and confirmed the fact that States do not exercise authority or jurisdiction over quasi-sovereign tribal governments. A more appropriate arrangement would be for the States to contract directly with Indian tribes under suggested procedures that I have given in my written testimony.

In conclusion, Mr. Chairman, Ms. Snowe, members of the committee, I would like to say that we appreciate very much your giving us this opportunity to present testimony. We trust that you will take into consideration the serious concerns that we have with regard to the consistently underserved and nonparticipating American Indian, Alaskan Native and Hawaiian Native elders under the programs of the Older Americans Act.

I want to thank you for giving us this opportunity and I will submit my full remarks for the record.

Mr. Downey. Thank you, Mr. Cook.

I want to thank all of the members of the panel. I think you have helped to open our eyes to some of the concerns that we have had in the initial statement of regulations. All of your testimonies, as I said to the other panel, will be part of the comments that we submit and we will be watching them closely. Of this, you can be assured.

All those who have not testified today, we will take your statements if you provide them to the record before the close of business on Tuesday, May 10.

Ms. Snowe.

Ms. Snowe. Thank you, Mr. Chairman. I want to thank all the witnesses as well for providing some very substantive and excellent recommendations for changes in the proposed regulations and also for analyzing some of the serious concerns that you have on the part of your own clients.

I appreciate your testimony today.

Mr. Downey. We are, as well, particularly concerned about the confidentiality of complaints made to the ombudsman and we will make sure that that is highlighted.

Thank you. The hearing stands adjourned.

[Whereupon, at 12:10 p.m., the hearing was adjourned.]

APPENDIX

STATEMENT BY

THE NATIONAL CAUCUS AND CENTER ON BLACK AGED, INC.

TO THE

**SUBCOMMITTEE ON HUMAN SERVICES
HOUSE COMMITTEE ON AGING**

ON

PROPOSED REGULATIONS FOR THE OLDER AMERICANS ACT

Mr. Chairman and Members of the Human Services Subcommittee, the National Caucus and Center on Black Aged appreciates the opportunity to submit testimony on the Administration's proposed regulations governing the Older Americans Act Title III (State and Community Programs on Aging) and Title IV (Native American Programs) activities. NCBA shall direct its comments to Title III, especially those provisions impacting on elderly Blacks and other low-income older Americans.

At the outset, we believe the Administration on Aging deserves special praise for preparing the proposed regulations in an expeditious manner.

A. Serving Low-Income Older Minorities

Additionally, NCBA is supportive of numerous references in the proposed regulations which focus on the special needs of older persons with the greatest economic or social needs, with particular emphasis on low-income aged minorities. Quite clearly, the 1987 Older Americans Act Amendments sought to promote minority participation in Older Americans Act programs. One important reason is that minority participation in the Title III supportive and nutrition services programs has dropped sharply during this decade. For example, the minority participation rate for Title III-B supportive service has plummeted by 25.6 percent, from 21.9 percent in fiscal year 1980 to 16.3 percent in 1986. It has slipped by 12.1 percent during this decade for the nutrition program for the elderly, from 19.0 percent in fiscal year 1980 to 16.7 percent in 1986.

Intrastate Funding Formula: NCBA is particularly pleased that section 1321.37 directs state units on aging (SUAs) to develop and use an intrastate funding formula which reflects the proportion of "persons age 60 and over in greatest economic or social need with particular attention to low-income

minority individuals." This is consistent with the landmark Maek v. Martinez case. The U.S. District Court for the Southern District of Florida required the State of Florida to incorporate a minority factor in a new intrastate funding formula which adequately implements the Older Americans Act statutory mandate to give particular attention to low-income minority elderly persons. Moreover, the regulation is necessary to implement the statutory directive in section 305(a) (2) (E) which requires SUAs to "provide assurance that preference will be given to providing services to older individuals with the greatest economic or social needs, with particular attention to low-income individuals, and include proposed methods of carrying out the preference in the State plan."

(Emphasis added.)

However, it is not enough just to have these directives in the Older Americans Act and accompanying regulations. There must be a commitment and direction from the Administration on Aging to assure that the minority factor in the intrastate funding is, in fact, a reality and effectively implemented.

Minority Representation on Area Agency Advisory Councils: Similarly, NCBA favors section 1321.57 which requires area agency advisory councils to have older Americans representing a majority of the members on the panel. Additionally, the proposed regulation mandates minority elderly persons to be represented on the advisory council.

NCBA believes that this requirement is crucial because advisory councils often influence the types of services that are provided to older persons in a planning and service area, as well as the focal point for delivering those services.

Responsibilities of Service Providers in Serving Minorities: Section 1321.65 implements a new requirement in the 1987 Older Americans Act Amendments that service providers must specify how they intend to satisfy the needs of low-income minority individuals. Moreover, it directs service providers to attempt to serve low-income minorities at least according to their proportion of the aged service area population.

This language can help considerably to promote minority participation in Title III services. However, AoA must effectively enforce this provision in order for it to fulfill its great potential.

Advocacy Responsibilities of Area Agencies on Aging (AAAs): NCBA further supports section 1321.61. It directs AAAs to assume a leadership role in assisting communities in targeting resources to older Americans with the greatest economic or social needs, especially low-income minorities.

Other Provisions: The proposed regulations include other provisions that NCBA favors to focus increased attention on the needs of older minorities.

These include:

- Section 1321.17(f)(8) calls upon SUAs to conduct outreach efforts to locate older Americans with the greatest economic or social needs, with particular attention to low-income aged minorities.
- Section 1321.17(f)(10) directs that state plans shall target preventive health services to those elderly persons with the greatest economic or social needs, especially low-income aged minorities.

B. Service Contributions

NCBA believes that clarifying language is needed for contributions under section 1321.67. Specifically, we favor an affirmative declaration that no pressure tactics -- subtle or overt -- may be employed to encourage or coerce

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older persons to make contributions. Some authorities maintain that a correlation exists between the declining minority participation rate in Older Americans Act programs during the 1980's and the increased emphasis on contributions. The harsh reality is that many low-income aged minority individuals are too proud to receive a meal for free when most other elderly persons at a senior center make contributions. The problem is further intensified if an element of coercion exists to contribute.

NCBA also questions AoA's statutory basis for encouraging contributions for Title III-B supportive services. Congress has only authorized contributions for the nutrition program for the elderly under section 307(a)(13)(C)(ii) of the Older Americans Act. The statute is silent about allowing contributions for supportive services. We, therefore, recommend that section 1321.67 of the proposed regulations be limited in its scope to the nutrition program.

C. Confidentiality and Disclosure of Information

NCBA has concerns about the confidentiality and disclosure provision in the proposed regulations. Section 1321.51(d) requires the state ombudsman to allow the director of the SUA to have access to the ombudsman's files. These files contains complaints by nursing home and other long-term care residents, as well as other confidential information.

Congress, therefore, included a number of safeguards in the 1987 Older Americans Act Amendments to protect the confidentiality of this sensitive information and the safety of the complainants. Nursing home personnel often take retaliatory measures against residents filing complaints or those viewed as "troublemakers".

The proposed regulations weaken these safeguards and the fundamental principle of confidentiality in order for an ombudsman to function effectively on behalf

of residents in long-term care facilities. The 1987 Older Americans Act Amendments require (1) the written consent of the complainant or resident in the long-term care facility or (2) a court order before the individual's identity can be revealed. NCBA believes it is important to maintain this protection. Consequently, we recommend that section 1321.51(d) be deleted or alternative language be inserted which would maintain the existing statutory protections.

D. Legal Assistance

NCBA believes that several actions are needed to improve and perfect the proposed regulations governing legal assistance.

Legislative Lobbying: First, the proposed regulations place more stringent restrictions on legislative and administrative advocacy than exists under Legal Services Corporation (LSC) regulations. This is because the AoA-proposed regulations adopt the LSC restrictions on legislative and administrative advocacy but without the exceptions. NCBA believes that AoA should either follow the LSC restrictions relating to legislative and administrative advocacy or apply different rules but only after consultation with legal services providers and others with an interest in this issue.

As a practical matter, regulations may not be needed on this issue because other regulations govern the conduct of most legal services providers. For example, LSC regulations apply to LSC grantees. Often non-profit organizations would generally be governed by OMB Circular A-122 regarding lobbying activities.

Revealing Identity of Clients: Second, section 1321.51 should state affirmatively that the names, addresses and telephone numbers of clients served with Older Americans Act funds are considered privileged information. This

point needs emphasis and clarification in the proposed regulations. The American Bar Association has rendered an informal opinion that an attorney who reveals this information voluntarily without the client's consent has violated the canons of ethics.

Reporting Requirements by Legal Services Providers: Third, NCBA supports legal services providers regarding reporting requirements. Specifically, we favor the completed case method which now applies for LSC grantees, rather than time records as required by AAAs. The completed case method is a less burdensome record keeping method, and allows legal services attorneys to focus more attention on representing clients rather than paperwork. Moreover, it would permit legal service providers who are funded by the Older Americans Act and the LSC Act to have a more efficient single reporting method, rather than dual requirements.

Hearing: Fourth, NCBA favors specific regulations to provide guidance for fair hearing when services providers are denied funding or an application for funding is rejected. The fundamental ingredients for a fair hearing should be incorporated in this regulation, including adequate notice, and adequate opportunity to prepare for the hearing, access to relevant materials in the possession of the SUA or AAA, a right to provide witnesses and to cross examine opposing witnesses, a right to an impartial examiner, a written record of the proceeding, and a written decision.

Minimum Expenditure of Funds for Legal Assistance: Finally, the 1987 Older Americans Act Amendments require state plans to specify a minimum percentage of funds that must be expended for each of the priority services -- in home, access, and legal services -- in the absence of a waiver. We believe that the

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proposed regulations should provide guidelines for meeting this requirement.

For example, the regulations could require that at least 6 percent of Title III-B funds be used for each of the priority services.

E. Conclusion

In conclusion, the National Caucus and Center on Black Aged believes that our proposals are reasonable and realistic. We urge the Subcommittee on Human Services to support these measures. We also commend the Subcommittee again for holding this timely hearing and for the leadership that it has displayed on issues affecting the Older Americans Act during its existence.



May 6, 1988

The Honorable Carol Fraser Fisk
Commissioner
Administration on Aging, Room 4760
330 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Commissioner Fisk,

I am writing this letter to offer comments on the proposed Older Americans Act regulations published in the Federal Register on March 29, 1988.

I would like to make the general observation that these regulations go beyond earlier versions in emphasizing state control through monitoring and enforcement rather than a cooperative spirit in administration of this program. Although President Reagan has emphasized local autonomy in administering federal programs with an attendant reduction in restrictions and paperwork, these regulations seem to run counter to those principles.

I would, however, like to focus my comments on one specific issue -- the deletion of the current provision allowing use of Title III supportive services funds for program development and coordination. Congress, the Administration on Aging and the Georgia Office of Aging have added new requirements and initiatives such as data collection and reporting requirements, linking focal points, coordinating with Alzheimers victims and families, a healthy older people's initiative, and the compilation and dissemination of information on long term care financing and post-secondary educational opportunities, to name a few. However, there has been no increase in funding.

Our AAA received \$49,871 in federal administrative dollars in the current fiscal year to run a comprehensive aging program in a rural area comprising 10 counties. Congress recognized this difficulty when it provided for an increase in administration from 8.5% to 10%. (Some federal programs like the Job Training Partnership Act allow 15% for administration.) The increase in our case, which would be some \$8,000, is small when one considers the inflation that has occurred since our last increase in federal funds. Nevertheless, we welcome this positive development.

Your proposal to remove program development and coordination funds from us, though, would completely destroy the effectiveness of our program. In fact, we could do little more with \$38,000 than monitor sub-contractors and compile reports for the state. We certainly could not operate anything like the comprehensive, coordinated system contemplated by the Older Americans Act. If we no longer had access to the \$49,871 in federal funds we now utilize for coordination, program development, and advocacy, we would have to eliminate staff positions and could no longer expand services, generate additional resources, and coordinate activities throughout our rural area. This is certainly not the direction which I read into Congress's actions in amending the Older Americans Act.

Commissioner Carol Fisk
May 6, 1988.
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I request that you make no change in the current regulations regarding program development and coordination funds so that we may continue to provide a meaningful program to the older citizens of Northeast Georgia.

Thank you for the opportunity to offer these comments.

Sincerely

A handwritten signature in dark ink, appearing to read "J. K. Reap", is written over the typed name.

James K. Reap
Coordinator
Area Agency on Aging

cc: Senator Sam Nunn
Senator Wyche Fowler
Congressman Doug Barnard
Congressman Ed Jenkins
Congressman J. Roy Roland

JKR/smm

REGION IX



Area Agency on Aging, Inc.

SPECIALISTS IN AGING

ROBERT L. DOLSEN
EXECUTIVE DIRECTORLYNN B. KELLOGG
ASSOCIATE DIRECTOR

May 17, 1988

MEMORANDUM

TO: Carol Fraser Fisk, U.S. Commissioner on Aging

FROM: Robert L. Dolsen, Executive Director *Robert L. Dolsen*

RE: PROPOSED RULES FOR 1987 AMENDMENT TO THE OLDER AMERICANS ACT

The proposed rules published March 29, 1988 in the Federal Register are, without question, the most clearly disruptive in the fourteen years of the development of the Act. They certainly do not reflect the support of the Area Agencies on Aging expressed in the U.S. Commissioner on Aging's public and private comments to me.

The proposed rules assault the local autonomy and flexibility, the bottoms-up planning, and the emphasis on local systems-building so fundamental to the Older Americans Act. Nowhere in the newly-amended Act is there a suggestion that Area Agencies on Aging relinquish their local authority. The thrust of the rules are clearly not what Congress intended. Below are some of the instances the rules must be changed in order to comply with legislative intent.

MEMORANDUM

TO: Commissioner Fisk
 FROM: Robert L. Dolsen
 RE: PROPOSED RULES FOR 1987 AMENDMENT TO THE OLDER AMERICANS ACT
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MISSION OF THE OLDER AMERICANS ACT, AND THE ROLES OR STATE UNITS
 ON AGING AND AREA AGENCIES ON AGING

From their inception in 1973 Area Agencies on Aging could not be part of state government, a provision which assured the autonomy of AAAs. To make them "agents" of the state is to destroy that critical autonomy. At a recent hearing, Commissioner Fisk stated that referring to AAAs as "agents" of the state was designed to strengthen their authority. If so, the Commissioner should strike all references to AAA as agents of the state, and add a simple statement of the Area Agency on Aging's autonomy and flexibility, as the Act intends.

PROGRAM DEVELOPMENT AND COORDINATION PROHIBITION

The recent amendments to the Older American Act recognized that 8.5% was inadequate to operate Area Agency and to administer contracts. (Substance Abuse agencies and Regional Planning Commissions routinely take 15%.) There is no suggestion in the Act to use the additional 7.5% to replace program development or coordination.

Program development is defined by AoA differently from Administration and is aimed at building "comprehensive, coordinated systems of services." Substance Abuse agencies and other local contracting agencies have no similar mandate, which in the case of our local AAA, has assured over a million dollars

MEMORANDUM

TO: Commissioner Fisk
 FROM: Robert L. Dolsen
 RE: PROPOSED RULES FOR 1987 AMENDMENT TO THE OLDER AMERICANS ACT
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coming into our region annually as resources for a local system of aging services. The prohibition against program development would dismantle our most effective tool in drawing in private and other public dollars, and other market systems, to serve older persons.

To prohibit the direct delivery of program development and coordination by Area Agencies would help not a single Area Agency but would hurt critically most of them. The prohibition provision should be deleted.

It is curious that AoA would propose that direct delivery of program development and coordination, mandated AAA activities, be prohibited, yet allow other hands-on services to be delivered directly with a state waiver.

PRIOR STATE REVIEW OF CONTRACTS

45 CFR PART 1321, April 1, 1985, p. 12944, states,

Making grants or entering into contracting is a normal exercise of Area Agency responsibility. We have, therefore, concluded the autonomy of Area Agencies is sufficient to require that Area Agency granting and contracting not be subject to review and approval by the state agency except as provided under Section 212 of the Act.

OMB Circular A-110, Attachment O, States,

Awards shall be made to the bidden/offer or whose bid/offer is responsive to the solicitation and is most advantageous to the recipient [AAA], price and other factors considered.... Any and all bids/offers may be rejected when it is in the recipient's [AAA's] interest to do so.

MEMORANDUM

TO: Commissioner Fisk
 FROM: Robert L. Dolsen
 RE: PROPOSED RULES FOR 1987 AMENDMENT TO THE OLDER AMERICANS ACT
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The amended Act has not changed this authority, but some states have challenged it, asserting the states' rights to force a AAA to contract against its will. The Administration on Aging is aware of this. Basic contract law prohibits a third party from forcing either of two parties to enter into a contract against either one's will, even for administrative convenience. To allow this is to open up a maze of legal liability. (Who is legally responsible if a subcontractor fails in its contractual obligation? The contracting agency, who was forced to contract? The state, which required it? The Federal government, which allowed the state to intrude?) The contracting agency must have the explicit autonomous authority to choose its subcontractors. It is essential a statement assuring AAA contracting authority be included in the rules, and the prohibition against state prior review be reiterated.

DIRECT SERVICE DEFINITION

"Any activity performed to benefit an older individual" encompasses every activity of the Aging Network. It would be appropriate to divide direct services into those relating to the statutory functions of AAAs (program development, coordination, planning, advocacy, access services, etc.), which would not require a waiver, and those which may promote in the AAA a vested interest, the event of which would require a waiver.

MEMORANDUM

TO: Commissioner Fisk
FROM: Robert L. Dolsen
RE: PROPOSED RULES FOR 1987 AMENDMENT TO THE OLDER AMERICANS ACT
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ADVOCACY

To deny the advocacy role of AAAs on the Federal level would be to deny an important local voice on such critical issues as Medicare and Medicaid. Surely that would not be what either Congress or AoA has intended. The AAAs have been responsive to their constituency and responsible in carrying out their mandated advocacy function. Area Agencies on Aging should be permitted to comment on all legislative actions regardless of the political level from which they emanated.

* * *

The proposed rules attempt to impose a rigid hierarchical structure on the Aging Network, which cannot be done without destroying the unique character of the Older Americans Act. Unlike substance abuse, or community action, or job training, which, with a few services delivered in a few modes, can be easily standardized statewide, aging services range across myriad needs met with dozens and dozens of possible services provided by many possible agencies in a wide variety of settings, differing markedly from one local community to the next. Ideology aside, the best way to devise systems in this milieu is to establish Area Agencies, provide them with the support, and let them be the responsible agencies for effecting "comprehensive, coordinated community-based systems of services."

MEMORANDUM

TO: Commissioner Fisk
FROM: Robert L. Dolsen
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This has been recognized through the evolution of the Older Americans Act, and should be reflected in the implementing regulations. These proposed rules do not reflect that understanding, and AoA should consider a wholesale revision of these proposed rules in order to have older persons served at the local level in the way AoA has always professed to wish them served.

RLD/DMR

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Office of Human Development Services****45 CFR Parts 1321, 1326 and 1328****Grants for State and Community Programs on Aging; and Grants to Indian Tribes and Organizations Service Older Hawaiians for Supportive and Nutrition Services****AGENCY:** Administration on Aging (AoA), Human Development Services Office, HHS.**ACTION:** Notice of proposed rulemaking.

SUMMARY: The Administration on Aging (AoA) proposes new and revised regulations for Part 1321 for grants to State and Community programs on aging redesignates Part 1328 for grants to Indian Tribes and organizations as Part 1326, and adds a new Part 1328 for grants to Native Hawaiians. The basis for these changes is the passage of Pub. L. 100-175 (the Older Americans Act Amendments of 1987) and the Department's commitment to regulatory reform.

These proposed rules implement Titles III and VI of the Older Americans Act, including the amendments to the Act which modify the current program. The changes emphasize the strengthened roles of the State and area agencies on aging in the development of community-based systems of services.

DATE: Comments must be received on or before May 31, 1988.

ADDRESS: Please address comments to: Carol Fraser Fisk, Commissioner, Administration on Aging, Room 4760, 330 Independence Avenue, SW., Washington, DC 20201. Beginning April 12, 1988, copies of the comments will be available for public inspection in Room 4739, 330 Independence Avenue, SW., Washington, DC 20201, between the hours of 9:00 am and 4:00 pm.

FOR FURTHER INFORMATION CONTACT: Frederick Luhmann, Office of State and Tribal Programs, Administration on Aging, Room 4739, 330 Independence Ave., SW., Washington, DC 20201. (202) 245-0011.

SUPPLEMENTARY INFORMATION**Background**

The Older Americans Act was first enacted in 1965. The President signed the Older Americans Act Amendments of 1967 (Pub. L. 100-175) on November 29, 1967. The Act was amended eleven times between 1965 and 1987.

As first enacted, the Act authorized funding under Title III to support in each State a State Agency on Aging. Title III also provided funds for each State agency to initiate local community projects to provide social services to older persons.

In 1972, a new Title VII was enacted which authorized funds for local community projects to provide nutrition services to the elderly. The projects were designed to provide older persons aged 60 and older with at least one hot nutritious meal five or more days a week. In 1973, the amendments revised the Title III State Grant Program by requiring the State agency to: (1) Divide the entire State into planning and service areas, (2) determine in which areas an area plan would be developed, and (3) designate an area agency on aging to develop and administer the plan in each area. The 1973 amendments also added a new Title V to the Act which authorized the Commissioner to make grants directly to local community agencies to pay part of the cost of the construction, acquisition, renovation, alteration, or initial staffing of facilities for use as multipurpose senior centers.

The 1978 amendments consolidated under Title III the social services, nutrition services, and multipurpose senior center programs formerly authorized under Titles III, V and VII. This consolidation was designed to eliminate duplicative and overlapping functions that had been conducted under each Title. It also reemphasized the concept of a single focal point for service delivery within each community. The 1978 amendments enacted a new Title VI, a direct grant program to Indian tribal organizations for older Indians. The 1981 amendments made several technical amendments to the Act and reinforced the basic direction established under the 1978 amendments. Most of the changes expanded the capacity of State agencies, area agencies and tribal organizations through increased administrative flexibility.

The 1984 amendments included a number of changes in the various service programs under Title III, including provisions to increase further the ability of States to transfer funds between their separate allotments for supportive and nutrition services; to specify particular attention to the needs of low-income minority older persons; to require area agencies to conduct activities to facilitate coordination of community-based long-term care services; and to strengthen the long-term care ombudsman program. In addition, the 1984 amendments modified the

manner in which funds for State administration are allocated to State agencies on aging, specified a statutory limitation on the amount of funds which could be used for administration of Title V, and created a new title for health education and training activities for older persons.

In 1966, legislation increased the authorization of appropriations for the USDA cash and commodity subsidy program for fiscal years 1965-67 and set the level of reimbursement at 56.76 cents for each meal served under Title III for each of those years. The 1967 amendments removed the former provision under which the USDA reimbursement rate was related to changes in the Consumer Price Index. A new fixed reimbursement rate was established for the four year authorization created by the 1967 amendments.

The 1967 amendments provide a strong basis for Older Americans Act supported activities that are responsive to the complex and changing environment which is emerging with the aging of American society. With enactment of these amendments, the Act continues to underscore the collaborative efforts that are needed to ensure that every community in this nation provides the opportunity for individuals to live and mature with dignity and independence. The reauthorized Act reaffirms expectations that AoA, State agencies on aging and area agencies on aging provide leadership at their respective levels and work to establish strong partnerships with other public, private and voluntary sector organizations to ensure that the nation is responding to the challenge of an aging society. The role of the State agency on aging is reinforced as the developer of policies and procedures to guide and direct area agencies. The amendments also further enhance the role of the area agency on aging as an advocate on behalf of the elderly and catalyst for ensuring the existence of community-based systems of services for older persons in every community in the planning and service area.

The 1967 amendments authorize the initiation of a number of activities including the establishment in the Administration on Aging of an Office for American Indian, Alaskan Native and Hawaiian Native Programs headed by an Associate Commissioner who would be responsible for Title VI and for chairing an interagency task force related to older Indians. The amendments also establish a separate Title VI-B program of grants for supportive and nutritional services to

older Hawaiian Natives. Under Title III, the amendments create: a new Part D to support non-medical in-home services for frail older persons; a new Part E providing grants to States to assist them in meeting special needs of older persons; a new Part F supporting preventive health services for the elderly; and a new Part G providing grants to States for programs to prevent abuse, neglect and exploitation of older individuals. The new amendments require each State to establish an Office of State Long-Term Care Ombudsman. The Commissioner on Aging is required to conduct a study of the ombudsman program and report to Congress on the findings and recommendations of the study.

Regulation Development

In conjunction with the Administration's effort to reduce regulatory burden and to provide States and area agencies with greater flexibility to respond to the needs of their respective populations, the Department established several rulemaking principles to be applied in the development of regulations.

These principles are to:

- (1) Insure that all regulations are clearly within the authority delegated by law and consistent with Congressional intent.
- (2) Emphasize private market forces whenever feasible, rather than government mandate, when developing policies to reach desired objectives.
- (3) Provide maximum flexibility to State and local governments.
- (4) Minimize Federal, State, local and private costs.
- (5) Prevent fraud, abuse, waste and inefficiency.
- (6) Eliminate regulations not serving a compelling Federal interest or reform those not implemented in the least intrusive means available.

These principles provided the framework used by the Administration on Aging in developing the proposed rules to implement the 1967 Amendments to the Act.

In developing these proposed regulations, the framework was changed to improve their logic and readability. However, these structural changes are primarily intended to clarify provisions in the Act or in current regulations. Virtually all of the content of the current regulations has been retained. These new regulations include the following sections with content unchanged from the current regulations: § 1321.25, § 1321.27, § 1321.28, § 1321.31, § 1321.33, § 1321.41, § 1321.43, § 1321.46, § 1321.56, § 1321.66, § 1321.75, § 1321.77, § 1321.79, § 1321.81 and § 1321.83. Although the

content is unchanged, the section number may differ from current regulations.

The changes proposed fall into three clusters:

1. Changes to reaffirm the intent of the Older Americans Act.

Given the growth in the number of older persons and increased interest in aging issues, there is a need to reaffirm the nature of the partnerships and the leadership roles of those who have responsibilities under the Act to develop a range of options for all older persons in our nation. Such clarifications were made in the types of proposed regulations: § 1321.7 Mission of the State agency; § 1321.53 Mission of the area agency; and § 1321.63 Purpose of services allotments under Title III.

2. Changes to implement provisions of the 1967 reauthorization of the Act.

The 1967 amendments to the Act greatly expand the challenges and responsibilities of all partners in the aging network. In order to assure that legislative intent is fulfilled in the most efficient and coordinated manner, guidance is necessary in a number of areas. Examples of the types of changes proposed to properly guide implementation of the 1967 amendments include the following: § 1321.11 State agency policies, § 1321.37 Intrastate funding formula, and § 1321.55 Organization and staffing of the area agency.

3. Changes to make technical corrections in current regulations.

Minor technical corrections in the current regulations are necessary to properly reflect the intent of the regulations or to cite cross-references more precisely. Examples of the technical changes proposed include the following: § 1321.19 Amendments to the State plan, § 1321.35 Withdrawal of area agency designation, and § 1321.67 Service contributions.

We are soliciting comments only on those sections of the regulations noted below which discuss new or revised regulatory provisions. Opportunity for public comment previously was provided on all of the other content of the regulations which remain unchanged. In the explanation given below, discussion is focused on the nature of and reasons for proposing the changes from current regulations.

Part 1321—Grants to State and Community Programs on Aging

Section 1321.1 Basis and purpose of this part.

Paragraphs 1321.1 (b) and (c) are revised to clarify and better characterize

the expected result and further emphasize the need to target efforts towards older individuals with the greatest social or economic need, with particular emphasis on low income minority elderly persons.

Section 1321.3 Definitions.

All of the definitions in the current regulations are retained and additional definitions for the following terms are provided: frail, in-home service, official duties, periodic, service, and significant population.

"Frail" and "in-home service" are defined in Title III, Part D. of the Act and are added to make these terms applicable to all programs under this Part.

The Act in section 307(a)(12)(f) requires the Commissioner to define "official duties," and this definition is proposed to carry out this requirement.

"Periodic" is defined to mean at one year intervals, at minimum, so that evaluation and public hearing requirements at the area and State levels can be coordinated with a required annual report on targeting to the President and the Congress.

"Significant population" with respect to required outreach to older Indians is defined in section 306(a)(6)(N) as at least 50 eligible persons because it seems reasonable to use the same population threshold the Act prescribes for a tribe to qualify for a Title VI grant.

Section 1321.5 Applicability of other regulations.

A cross-reference to 5 CFR Part 900, Subpart F, Standards for a Merit System of Personnel Administration, has been added as these standards apply to State and Community Programs on Aging.

Section 1321.7 Mission of the State agency.

A general statement is included on the mission of the State agency to emphasize Congressional interest in its leadership role in fostering the development of comprehensive and coordinated community based systems throughout the State. The role in designating area agencies on aging is also clarified.

Section 1321.9 Organization and staffing of the State agency.

The amendments to the Act place significant importance on advocacy, particularly with regard to the ombudsman program. Thus, requirements in this section emphasize the advocacy role of the State agency and the requirement regarding staffing of the State agency, including the State Long-Term Care Ombudsman Office.

Some States have enacted laws creating ombudsman agencies and functions. In some cases the State prescribed functions differ from those required in the Older Americans Act. We are proposing in § 1321.9(d) to require the Governor in these cases to include a State plan assurance that the requirements of the Act will be met in addition to those of the State statute.

The Act in section 307(a)(12) requires that the Office of the State Long-Term Care Ombudsman be free of conflict of interest. If the Office is established by contract or other arrangement outside of the State agency on aging, the Act prohibits it from being part of an agency or organization which is responsible for licensing or certifying long-term care services. However, if the State agency on aging has the function of licensing or certifying long-term care services, the Department has determined that the State agency is not prohibited by the Act from operating the Office of the State Long-Term Care Ombudsman directly. In the latter case, the State would have to promulgate specific policies and procedures to assure that no conflict of interest will occur. The Act in section 307(a)(12)(A) also requires that the ombudsman for each State serve on a full time basis.

Section 1321.11 State agency policies.

A State agency shall develop policies governing all aspects of the operation of Title III programs.

Major changes in the Act with respect to the statewide ombudsman program will necessitate the development of new State policies and procedures. The specificity of the Act and the varying circumstances in each State make it necessary that each State develop written policies and procedures on the ombudsman program, including the relationship of the State ombudsman program at the local level to the area agency.

The current regulations include in § 1321.55 a prohibition on the State agency requiring an area agency to submit for prior review or approval any proposed subgrants or contracts with public or private nonprofit agencies or organizations. This requirement is being deleted in the proposed regulations because State policies govern the operational aspects of this part.

Section 1321.13 Advocacy responsibilities.

This new section is taken in large part from § 1321.33 of the current regulations. The list of advocacy functions in the new § 1321.13(a)(1) has been expanded to conform to the expanded list of such functions in the Act. Also, portions of

this section which are repetitive of other provisions have been deleted.

Section 1321.15 Duration, format and effective date of the State plan.

This section is a modified version of § 1321.8 in the current regulations.

Section 1321.17 Content of State plan.

The current regulations in § 1321.9(e)(5) permit the State agency to fund program development and coordination activities as a cost of supportive services after the State agency has spent 8.5 percent of the total of its combined allotments for supportive and nutrition services on the administration of area plans. This provision is not included in the proposed regulations because the level of funds available for the administration of area plans is increased by the 1987 amendments to the Act from 8.5 percent to 10 percent of a State's Title III funds. Therefore, program development and coordination activities may no longer be funded as a cost of supportive services.

In paragraph (e), prior Federal fiscal year information on efforts to assist low income minority and rural elderly people is included as an annual State plan requirement. In sections 307(a) (23) and (29) of the Act, the Congress identified this information as a priority requirement.

In paragraph (f)(1), State plan assurance is proposed to emphasize that the State agency shall monitor each area agency to be certain that all of the activities in which the area agency engages are appropriate to its statutory mission.

In paragraph (f)(7), State plan assurance is added requiring each State to develop policies and procedures to facilitate management of the program at all levels.

In paragraph (f)(8), because of the concern of Congress and multiple references in the Act to older persons in greatest economic or social need, a State plan assurance is added requiring an assurance that each area agency will arrange for outreach with special emphasis on this category of older persons, with particular attention to low-income minority individuals.

In paragraph (f)(9), the Act contains many explicit new requirements for the Commissioner to collect data. The new data collection requirements can only be met with the full and timely cooperation of all States, area agencies and service providers. Thus, a new State plan assurance is included concerning the State agency's responsibilities for data collection from area agencies.

In paragraph (f)(11), we have implemented a new provision in section

305(a)(6) to require that area agencies make information available to elderly individuals about low or no cost opportunities for post-secondary education.

In paragraph (f)(12), we are proposing to implement section 307(a)(13)(I) to permit disabled individuals living in a household with and accompanying a person eligible for congregate meals to receive a meal funded under Title III-C. The conference committee report includes a statement that this eligibility does not extend to individuals who live together in an institutional setting (H.R. Conf. Rep. 100-427, 100th Cong. 1st Sess. 75 (1987)).

Section 1321.19 Amendments to the State plan.

This section replaces § 1321.11 of the current regulations. Under subsection (a)(3) a requirement is included that in any year in which a new State plan is not submitted, the State plan shall be amended to update information related to prior year services to minority and rural persons. States also are required to adhere to guidelines that the Commissioner will provide specifying how the information is to be presented. This provision will enable the Commissioner to meaningfully aggregate and analyze the information for reports that are required by the Act.

Section 1321.21 Submission of the State plan or plan amendments to the Commissioner for approval.

This section is based on § 1321.13 of the current regulations. A clarification is proposed requiring that amendments to the State plan as well as the State plan itself be signed by the Governor or the Governor's designee. This is the usual practice for most States and is proposed because amendments are only required in areas of substantial importance.

Section 1321.23 Notification of State plan or plan amendment approval.

Notification of the approval of State plan amendments will follow the same procedures as are used for approval of State plans. This is consistent with our rationale for changes proposed in § 1321.21.

Section 1321.35 Withdrawal of area agency designation.

This section is based on § 1321.39 of the current regulations. Congress has added new language to the Act in section 305(c) specifying that an area agency is "to function only" for the purpose of serving as an area agency. Language to enable States to withdraw area agency designation where their activities create a conflict of interest

with their statutory mission has been added. This section also adds language to assure that the State agency has policies and procedures regarding withdrawal of area agency designation.

Section 1321.37 Intrastate funding formula.

The Act has been amended in section 361 to provide for a program of preventive health services in a new Part F. The new program will require special accommodations in intrastate funding formulas based upon the requirement in section 362 of the Act that, in carrying out this part, the State agency give priority to areas of the State that are medically underserved and have a large number of individuals who have the greatest economic need. Paragraph (b) proposes a separate allocation to area agencies based on new criteria in section 362 of the Act.

Section 1321.47 Statewide non-Federal share requirements.

The intent of the Act is reflected in considering the ombudsman program and all other services as supportive services for purposes of determining the matching funds required to qualify for Federal funds under this part. The Act in section 304(d)(1) requires that the Federal share for the cost of administration of area plans will not exceed 75 percent and that the Federal share for the cost of supportive services, senior centers and nutrition services shall not exceed 85 percent of the cost. This regulation points out that the matching requirements apply on a statewide basis for each allotment which the State receives.

Section 1321.49 State agency maintenance of effort.

The amendments to the Act change the time period used in calculating the State agency maintenance of effort from one year to three years. Therefore, this section is changed to conform to the Act. It is important to note that the requirements of this section also apply to the ombudsman program. This means that any funds which a State receives for the ombudsman program from Title III may not replace State funding for the program.

Section 1321.51 Confidentiality and disclosure of information.

The current regulations in § 1321.19 require that the States have procedures to protect the confidentiality of information about older persons collected, "in the delivery of services." This requirement is expanded in paragraph (a) to include any information collected, "in the conduct of its

responsibilities." This change is made to ensure the privacy of elderly clients in all activities funded under this Part.

The Act contains a new requirement in section 306(d) that an area agency may not require any provider of legal assistance under Title III to reveal any information which is protected under attorney-client privilege. Paragraph (c) extends this prohibition to the State.

Section 307(a)(12) of the Act requires an assurance from the State agency that it shall "establish and operate" the ombudsman program regardless of whether the program is operated directly or through contract. Consistent with this provision of the Act, clarification is provided in paragraph (d) that the State agency on aging has the right of access to the files of the Office of the State Long-Term Care Ombudsman, notwithstanding the confidentiality requirements of section 307(a)(12)(D).

Section 1321.52 Evaluation of unmet need.

The Commissioner is required by September 30, 1989 to submit a report to the Congress summarizing in detail for each State the results of State evaluations of the unmet need for supportive services, nutrition services, and multipurpose senior services. The report to the Congress shall include recommendations of the Secretary with respect to the need for administrative action and legislation relating to satisfying the unsatisfied demand for supportive services provided at public or privately funded senior centers. The Commissioner is required under the Act to issue regulations to assure that the evaluations from the States include objective and statistical data.

Section 1321.53 Mission of the area agency.

In paragraph (a) we propose a mission statement of the area agencies to reaffirm Congressional intent concerning the fundamental responsibility of the area agency in providing leadership on all aging issues in the planning and service area. In keeping with this intent, the area agency, under the leadership and direction of the State agency on aging, is expected to initiate actions to carry out a wide range of activities which increase the capacity and foster the development or enhancement of comprehensive and coordinated community based services systems for older persons.

The characteristics or elements that a comprehensive and coordinated community based system shall exhibit

the proposed in paragraph (b). These characteristics or elements have been previously published and shared with all State agencies on aging and area agencies on aging and have received broad acceptance.

A clarification is included in paragraph (c) that expenditures of Older Americans Act funds are for activities which contribute to comprehensive and coordinated community based systems. In addition, in keeping with section 306(a)(3) of the Act, this section clarifies the responsibility of the area agency to designate community focal points, giving special consideration to designating multipurpose senior centers as such focal points. Focal point as used in this part is defined in section 302(12) of the Act to mean a facility established to encourage the maximum collocation and coordination of services for older individuals at the community level. This use of the term is distinct from its usage in section 306(a)(9)(D) of the Act which refers to the area agency as the advocate and focal point representing the interest of older individuals at the area level by reviewing, monitoring, evaluating, and commenting on Federal, State and local plans, budgets, regulations, programs, laws, etc.

Section 1321.55 Organization and staffing of the area agency.

Current rules at § 1321.57 regarding organization and staffing of the area agency are expanded to clarify that the area agency may be placed within an "umbrella" agency, such as a city or county human services department, council of governments, regional planning commission, or regional planning district.

If included under such a multipurpose agency, the area agency shall remain an identifiable unit that functions only for the purpose of serving as the area agency on aging.

Section 1321.57 Area agency advisory council.

The language of current § 1321.61 is modified to add a statement in paragraph (a) to emphasize that the advisory council's role is to assist the area agency in the development and coordination of community based systems of services for older persons. The role of the advisory council is also enhanced by requiring that the area plan and amendments be transmitted to the council for review before it is transmitted to the State agency for approval. In keeping with Congressional intent, individuals representative of supportive services organizations and health care organizations, including veterans' health care (if appropriate),

shall be included as members, as well as persons with leadership experience in the private and voluntary sectors.

The council also should involve individuals and representatives of organizations from the community who will directly contribute to enhancing the leadership role of the area agency.

Section 1321.61 Advocacy responsibilities of the area agency.

Additional language in paragraph (b)(5) of this section on the advocacy responsibilities of area agencies is included to reinforce the mission of the area agency to provide leadership in coordinating plans and activities with other organizations in the planning and service area concerned with the well-being of older persons. The revised policy language reflects the particular concern of Congress that the area agency assure that services provided throughout the planning and service area meet the needs of low income and minority older persons. Current rules in this area are found at § 1321.65.

Section 1321.63 Purpose of service allotments under Title III.

A new section is proposed related to service allotments under Title III to emphasize that services funded under Title III are intended to assist in the development or enhancement of comprehensive and coordinated service systems throughout each State. Each category of service listed in paragraph (a), except for ombudsman services, is subject to the requirement of allocation of funds through an intrastate formula that takes into account the geographical distribution of individuals aged 60 or older in the State and the proportion of older persons in greatest economic and social need with particular attention to low-income minority individuals. The intrastate formula shall also provide that for funds received for preventive health services, the State give priority to planning and service areas which are medically underserved as well as have large numbers of individuals who have the greatest economic and social need for such services. These categories of service are also subject to the requirement of a non-federal contribution of not less than 15 percent in matching funds.

Section 1321.65 Responsibilities of service providers under area plans.

This section proposes to add an assurance from area agencies, as required by section 13(a) of the 1967 Amendments, to define what a service provider shall provide to the area agency before the area agency awards Title III funds. The provider shall assure

that its services will contribute to the goal of developing responsive community-based systems and assure the timely submission of statistical and other information necessary for the area agency to plan, coordinate and evaluate its programs, and meet reporting requirements to the State. The service provider is further required to specify the outreach efforts that it will undertake to assure that it serves low income minority individuals in proportion to their numbers in the older population of the service area, and that services provided under Title III will be coordinated with other services in the area, and will not unnecessarily duplicate services available from other sources.

Section 1321.67 Service contributions.

This section clarifies the provision in current § 1321.69 that, as with other services under Title III, no means test may be used to determine the eligibility of older persons for the new in-home services program under section 343 of the Act.

Section 1321.69 Service priority for frail, homebound or isolated elderly.

This section reaffirms expectations that area agencies and service providers give priority to providing services to frail, homebound or isolated older persons. It reiterates § 1321.71 in the current regulations which, under criteria established by the area agency, also authorizes home-delivered meals for the spouse of the homebound older person.

Section 1321.71 Legal assistance.

Section 307(a)(15)(A) of the Act requires that the State plan contain an assurance that any recipient of funds for legal assistance " * * * will be subject to specific restrictions and regulations promulgated under the Legal Services Corporation Act " * * * as determined appropriate by the Commissioner." This provision was first included in the Act in the 1976 amendments. Accordingly, the Title III regulations which were issued in 1980 drew upon the regulations of the Legal Services Corporation (LSC) in covering the provision of legal services under the Older Americans Act. However, based on the Commissioner's statutory responsibility to determine which LSC regulations were appropriate to Title III, the treatment of legal services in the 1980 regulations was limited so as to be proportionate to the coverage of other services provided under Title III. In 1985, when the current Title III regulations were issued, a different approach to the treatment of legal services was adopted. At that time,

the coverage of legal services was significantly expanded with the result that legal assistance regulations constituted approximately one-quarter of the entire Title III regulations. This extensive coverage was disproportionate to the coverage of other services provided under Title III. It should be stated that even in this extended discussion of legal assistance, many of the LSC regulations were not included in the Title III regulations.

After reassessing the current regulations in preparation for revisions to accommodate the 1987 amendments to the Act, it was concluded that the extensive discussion of legal assistance was inappropriate for the following reasons: (1) Under regulatory reform unnecessary regulations in other areas of the Title III program have been reduced; (2) While legal assistance is important, it is one among many services which are provided with Title III funds; and (3) The detailed definitions of lobbying activities set forth in current LSC regulations (issued July 29, 1987 at 52 FR 28434) are not needed to carry out the purposes of Title III.

Since the States are provided the greatest possible flexibility in the manner in which other services are provided, the extent of regulatory detail in the treatment of legal assistance has been reviewed and commensurately reduced. The revised regulation seeks to assure that Title III legal assistance funds are used solely to carry out the purposes of the Act and not for extraneous activities, such as lobbying and other political activities. Thus, the intent of these regulations is the same as that of the LSC regulations but offered without the same level of detail.

Section 1321.73 Grant related income under Title III-C.

A new section is added which clarifies the use of grant related income. In general, use of grant related income is governed by 45 CFR Part 74, Subpart F, § 74.42, except that the use of program income as discussed in § 74.42(c), the deductive alternative, is not permitted. The Department has determined that the Act does not permit the use of the deductive alternative for utilizing program income from nutrition services because section 307(a)(13)(C)(ii) of the Act requires program income to be used to expand the services of Title III Part C projects.

Part 1328—Grants to Indian Tribes for Support and Nutritional Services

There are only two changes to the current regulations for this Part. The first is to change the number for this

Part from 1328 to 1326. This was done to make the Part number for the American Indian program precede the Part number for the program for older Native Hawaiians. This reflects the prior existence of the Indian program and its placement in the Act. The second change, which is in § 1326.19(d)(1), decreases from 60 to 50 the number of Indians aged 60 or older needed by a tribe to apply for a grant under this Part. This latter change is required by section 612(a)(1) of the amended Act. *For this part, we are soliciting comments only on this decrease in the number of Indians needed by a tribe to apply for a grant.*

Part 1328—Grants for Supportive and Nutritional Services to Older Hawaiian Natives

The regulations for this Part are nearly identical to the current regulations in Part 1328 for Grants To Indian Tribes. This is because the amendments to the Act creating the program for older Hawaiian Natives are similar to the existing program for American Indian elders. *Part 1328 is for an entirely new program, and we will, therefore, accept comments on all sections of this part.*

Section 1328.3 Definitions.

The definition of "Hawaiian Native" is taken from section 625 of the Act and the definition of "Older Hawaiian" is taken from sections 622 of the Act.

Section 1328.21 Application approval.

This section stipulates that the Commissioner approves grants for specific amounts and time periods without any implied obligation to renew, extend, or supplement the grant at any time in the future. The Commissioner also stipulates that preference may be given to eligible applicant organizations that have prior experience in serving Hawaiian Natives. These provisions are proposed to help assure successful development and implementation of the program.

Impact Analysis

Executive Order 12291

The Secretary has determined, in accordance with Executive Order 12291, that these rules do not constitute a major rule because they will not have an annual effect on the economy of \$100 million or more; result in major increase in costs or prices for consumers, any industries, any governmental agency or any geographic regions; or have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based

enterprises to compete with foreign-based enterprises in domestic or import markets. We do not believe that there will be any additional costs under these rules since the types of statutorily mandated data we will collect are ordinarily utilized by States for efficient program management.

Regulatory Flexibility Act of 1980

The Regulatory Flexibility Act of 1980, Pub. L. 96-354, requires that an agency prepare a regulatory flexibility analysis for a proposed or final rule if the rule would have significant economic impact on a substantial number of "small entities", i.e. small businesses, small non-profit organizations, or small governmental jurisdictions.

The responsibility for meeting the requirements of these regulations is on the State agencies and to a lesser extent on area agencies. Actual delivery of services may be provided in some circumstances by proprietary, public and not-for-profit agencies or organizations under grants or contracts from State or area agencies. Although area agencies and most service delivery agencies and organizations are "small entities" within the meaning of the Act, this rule will impose no significant burdens on State agencies, area agencies or other affected parties and will provide flexibility to State and area agencies in implementing the provisions of the Act. For these reasons, the Secretary hereby certifies that these regulations will not have a significant impact on a substantial number of small entities.

Executive Order 12806

The Secretary has determined, in accordance with Executive Order 12806, that these rules have been assessed in light of the family policymaking criteria of the Order and these rules have no significant potential negative impact on family well-being and will enhance family well-being. A certification to this effect will be transmitted to the Office of Management and Budget.

Recordkeeping and Reporting Requirements

Sections 202, 305, 306, 307, 614, and 623 of the Act require collection of data, area and State plans and Native American organization applications. These rules at §§ 1321.17, 1328.19 and 1328.19 contain revised information, collection requirements. The Act requires the Commissioner each fiscal year to collect from States statistical data on programs and activities carried out with funds provided under the Act. The data must include for each type of

service: the aggregate amount of funds expended, the number of individuals served, and the number of units of service provided. Additionally, the data must indicate the number of senior centers funded and the extent to which area agencies satisfied their statutory requirements concerning expenditure of adequate funds on specified services and targeted services to older persons in greatest need. In responding to new statutory data collection requirements, AoA will be sensitive to avoiding any needless burden on State and area agencies. AoA will provide States with an opportunity to comment on revised information collection requirements. As required by section 3504(h) of the Paperwork Reduction Act of 1980, we will submit a copy of these revised information collection requirements to the Office of Management and Budget (OMB) for its review.

OMB has not approved the revised information collection requirements contained in these rules. The new information collection requirements contained in 1321.17, 1328.19 and 1328.19 will not go into effect until OMB approval has been obtained. Although OMB has not approved the sections of these regulations associated with the development of State and area plans and Native American organization applications, those statutory activities required to maintain eligibility for funding remain in effect. When OMB assigns information collection approval numbers, we will publish a notice in the *Federal Register*.

List of Subjects

45 CFR Part 1321

Administrative practice and procedure, Aged, Grant program/social programs, Nutrition, Reporting requirements.

45 CFR Part 1328

Administrative practice and procedure, Aged, Grant programs Indians, Reporting requirements.

45 CFR Part 1328

Administrative practice and procedure, Aged, Grant programs Hawaiian Natives, Reporting requirements.

(Catalog of Federal Domestic Assistance Program Numbers: 13.633 Special Programs for Aging; Title III Part A and B-Grants on Aging; 13.635 Special Programs for Aging; Title III Part C-Nutrition Services); (13.635 Special Programs for Aging; Title VI-Grants for Indian Tribes)

Dated: February 26, 1988.

Carol Fraser Fisk,

Commissioner on Aging.

Approved: March 3, 1988.

Otis R. Bowen,

Secretary of Health and Human Services.

For the reasons set forth in the Preamble, Chapter XIII, Subchapter C, of Title 45, Subtitle B, Code of Federal Regulations is proposed to be amended as follows:

1. Part 1321 is revised as follows:

PART 1321—GRANTS TO STATE AND COMMUNITY PROGRAMS ON AGING

Subpart A—Introduction

S.c.

1321.1 Basis and purpose of this part.

1321.3 Definitions.

1321.5 Applicability of other regulations.

Subpart B—State Agency Responsibilities

1321.7 Mission of the State agency.

1321.9 Organization and staffing of the State agency.

1321.11 State agency policies.

1321.13 Advocacy responsibilities.

1321.15 Duration, format and effective date of the State plan.

1321.17 Content of State plan.

1321.19 Amendments to the State plan.

1321.21 Submission of the State plan or plan amendment to the Commissioner for approval.

1321.23 Notification of State plan or plan amendment approval.

1321.25 Restriction of delegation of authority to other agencies.

1321.27 Public participation.

1321.29 Designation of planning and service areas.

1321.31 Appeal to Commissioner.

1321.33 Designation of area agencies.

1321.35 Withdrawal of area agency designation.

1321.37 Intrastate funding formula.

1321.41 Single State planning and service area.

1321.43 Interstate planning and service area.

1321.45 Transfer between congregate and home-delivered nutrition service allotments.

1321.47 Statewide non-Federal share requirements.

1321.49 State agency maintenance of effort.

1321.51 Confidentiality and disclosure of information.

1321.52 Evaluation of unmet need.

Subpart C—Area Agency Responsibilities

1321.53 Mission of the area agency.

1321.55 Organization and staffing of the area agency.

1321.57 Area agency advisory council.

1321.59 Submission of an area plan and plan amendments to the State for approval.

1321.61 Advocacy responsibilities of the area agency.

Subpart D—Service Requirements

1321.63 Purpose of services allotments under Title III.

1321.65 Responsibilities of service providers under area plans.

1321.67 Service contributions.

1321.69 Service priority for frail, homebound or isolated elderly.

1321.71 Legal assistance.

1321.73 Grant related income under Title III-C.

1321.75 Licenses and safety.

Subpart E—Hearing Procedures for State Agencies

1321.77 Scope.

1321.9 When a decision is effective.

1321.81 How the State may appeal.

1321.83 How the Commissioner may reallocate the State's withheld payments.

Authority: 42 U.S.C. 3001 et seq.; Title III of the Older Americans Act.

Subpart A—Introduction

§ 1321.1 Basis and purpose of this part.

(a) This part prescribes requirements State agencies shall meet to receive grants to develop comprehensive and coordinated systems for the delivery of supportive and nutrition services under Title III of the Older Americans Act, as amended (Act). These requirements include:

- (1) Designation and responsibilities of State agencies;
- (2) State plans and amendments;
- (3) Services delivery; and
- (4) Hearing procedures for applicants for planning and services area designation.

(b) The requirements of this part are based on Title III of the Act. Title III provides for formula grants to State agencies on aging, under approved State plans, to stimulate the development or enhancement of comprehensive and coordinated community-based systems resulting in a continuum of services to older persons with special emphasis on older individuals with greatest economic or social need, with particular attention to low-income minority individuals. A responsive community-based system of services shall include collaboration in planning, resource allocation and delivery of a comprehensive array of services and opportunities for all older Americans in the community. The intent is to use Title III funds as a catalyst in bringing together public and private resources in the community to assure the provision of a full range of efficient, well coordinated and accessible services for older persons.

(c) Each State agency designates planning and service areas in the State, and makes a subgrant or contract under an approved area plan to one area agency in each planning and service area to serve as its agent in building comprehensive systems for older people throughout the State. Area agencies in

turn make subgrants or contracts to service providers to perform certain specified functions.

§ 1321.3 Definitions.

"Act" means the Older Americans Act of 1965 as amended.

"Administrative action," as used in section 307(a)(12)(A) of the Act with respect to the investigation and resolution of complaints under long-term care ombudsman programs, means any action or decision made by an owner, employee, or agent of a long-term care facility, or by a government agency, which affects the provisions of service to residents covered under the long term care program.

"Altering" or "renovating," as used in section 307(a)(14) of the Act with respect to multipurpose senior centers, means making modifications to or in connection with an existing facility which are necessary for its effective use as a center. These may include renovation, repair, or expansion which is not in excess of double the square footage of the original facility and all physical improvements.

"Constructing," as used in section 307(a)(14) of the Act with respect to multipurpose senior centers, means building a new facility, including the costs of land acquisition and architectural and engineering fees, or making modifications to or in connection with an existing facility which are in excess of double the square footage of the original facility and all physical improvements.

"Department" means the Department of Health and Human Services.

"Direct services," as used in this Part, means any activity performed to benefit an older individual by the staff of an area agency or by staff of a State agency in a single planning and service area State.

"Fiscal year," as used in this Part, means the Federal Fiscal Year.

"Frail," as used in this Part, means having a physical or mental disability, including having Alzheimer's disease or a related disorder with neurological or organic brain dysfunction, that restricts the ability of an individual to perform normal tasks or which threatens the capacity of an individual to live independently.

"Human services," as used in § 1321.41(a)(1) of this part, with respect to criteria for designation of a statewide planning and service area, means social, health, or welfare services.

"In-home service," as used in this Part, includes: (A) Homemaker and home health aides; (B) visiting and telephone reassurance; (C) chore maintenance; (D) in-home respite care

for families, including adult day care as a respite service for families; and (E) minor modification of homes that is necessary to facilitate the ability of older individuals to remain at home, and that is not available under other programs, except that not more than \$150 per client may be expended under this Part for such modification.

"Means test," as used in the provision of services, means the use of an older person's income or resources to deny or limit that person's receipt of services under this Part.

"Official duties," as used in section 307(a)(12)(I) of the Act with respect to representatives of the Long-Term Care Ombudsman Program, means work pursuant to the Long-Term Care Ombudsman Program authorized by the Act and carried out under the auspices and general direction of the State Long-Term Care Ombudsman.

"Periodic," as used in sections 306(a)(6) and 307(a)(8) of the Act with respect to evaluations of, and public hearings on, activities carried out under State and area plans, means, at a minimum, once each fiscal year.

"Reservation," as used in section 305(b)(4) of the Act with respect to the designation of planning and service areas, means any federally or State recognized Indian tribe's reservation, pueblo, or colony, including reservations in Oklahoma, Alaskan Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments.

"Service provider," as used in section 306(a)(1) of the Act with respect to the provision of supportive and nutrition services, means an entity that is awarded a subgrant or contract from an area agency to provide services under the area plan.

"Severe Disability," means a severe chronic disability of an individual that— (a) is likely to continue indefinitely; and (b) results in substantial functional limitation in 3 or more of the following major life activities: (1) Self-care, (2) Receptive and expressive language, (3) Learning, (4) Mobility, (5) Self-direction, (6) Capacity for independent living, and (7) Economic self-sufficiency.

"Significant population," as used in section 306(a)(6)(N) of the Act with respect to older Indians in the planning and service area, means that at least 50 persons eligible for services under the Act in the area are older Indians.

§ 1321.5 Applicability of other regulations.

Several other regulations apply to all activities under this part. These include but are not limited to:

(a) 45 CFR Part 16—*Procedures of the Departmental Grant Appeals Board*;

(b) 45 CFR Part 74—*Administration of Grants*, except Subpart N;

(c) 45 CFR Part 80—*Nondiscrimination Under Programs Receiving Federal Assistance Through the Department of Health and Human Services: Effectuation of Title VI of the Civil Rights Act of 1964*;

(d) 45 CFR Part 81—*Practice and Procedures for Hearings Under Part 80 of this Title*;

(e) 45 CFR Part 84—*Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Participation*;

(f) 45 CFR Part 91—*Nondiscrimination on the Basis of Age in HHS Programs or Activities Receiving Federal Financial Assistance*;

(g) 45 CFR Part 100—*Intergovernmental Review of Department of Health and Human Services Programs and Activities*; and

(h) 5 CFR Part 900, Subpart F, *Standards for a Merit System of Personnel Administration*.

Subpart B—State Agency Responsibilities

§ 1321.7 Mission of the State agency.

(a) The Older Americans Act intends that the State agency on aging shall be the leader relative to all aging issues on behalf of all older persons in the State. This means that the State agency shall proactively carry out a wide range of functions related to advocacy, planning, coordination, interagency linkages, information sharing, brokering, monitoring and evaluation, designed to lead to the development or enhancement of comprehensive and coordinated community based systems in, or serving, communities throughout the State. These systems shall be designed to assist older persons in leading independent, meaningful and dignified lives in their own homes and communities as long as possible.

(b) The State agency shall designate area agencies on aging to be the principal agents of the State to carry out the mission described above for the State agency at the sub-State level. The State agency shall designate as its area agencies on aging only those local agencies having the capacity and making the commitment to fully carry out the mission described for area agencies in § 1321.53 below.

(c) The State agency shall assure that the resources made available to area agencies on aging under the Older Americans Act are used to carry out the mission described for area agencies in § 1321.53 below.

§ 1321.9 Organization and staffing of the State agency.

(a) The State shall designate a sole State agency to develop and administer the State Plan required under this Part and serve as the effective viable advocate for the elderly within the State.

(b) The State agency shall have an adequate number of qualified staff to carry out the functions prescribed in this Part.

(c) The State agency shall have within the State agency, or shall contract or otherwise arrange with another agency or organization, as permitted by section 307(a)(12)(A), an Office of the State Long-Term Care Ombudsman, with a full-time State ombudsman and such other staff as are appropriate.

(d) If a State statute establishes a State ombudsman program which will perform the functions of section 307(a)(12) of the Act, the State agency continues to be responsible to assure that all of the requirements of the Act for this program are met regardless of the State legislation or source of funds. In such cases, the Governor shall confirm this through an assurance in the State plan.

§ 1321.11 State agency policies.

The State agency shall develop policies governing all aspects of programs operated under this Part, including the manner in which the ombudsman program operates at the State level and the relation of the ombudsman program to area agencies. The State agency is responsible for enforcement of these policies.

§ 1321.13 Advocacy responsibilities.

(a) The State agency shall:

(1) Review, monitor, evaluate and comment on Federal, State and local plans, budgets, regulations, programs, laws, levies, hearings, policies, and actions which affect or may affect older individuals and recommend any changes in these which the State agency considers to be appropriate;

(2) Provide technical assistance to agencies, organization, associations, or individuals representing older persons; and

(3) Review and comment, upon request, on applications to State and Federal agencies for assistance relating to meeting the needs of older persons.

(b) No requirements in this section shall be deemed to supersede statutory or other regulatory restrictions regarding lobbying or political advocacy with Federal funds.

§ 1321.15 Duration, format and effective date of the State plan.

(a) A State may use its own judgment as to the format to use for the plan, how to collect information for the plan, and whether the plan will remain in effect for two, three or four years.

(b) An approved State plan or amendment, as identified in § 1321.17, becomes effective on the date designated by the Commissioner.

(c) An agency may not make expenditures under a new plan or amendment, as identified in § 1321.17, until it is approved.

§ 1321.17 Content of State plan.

To receive a grant under this part, a State shall have an approved State plan as prescribed in section 307 of the Act. In addition to meeting the requirements of section 307, a State plan shall include:

(a) Identification by the State of the single State agency that has been designated to develop and administer the plan.

(b) Statewide program objectives to implement the requirements under Title III of the Act and any objectives established by the Commissioner through the rulemaking process.

(c) A resource allocation plan indicating the proposed use of all Title III funds directly administered by a State agency, and the distribution of Title III funds to each planning and service area.

(d) Identification of the geographic boundaries of each planning and service area and of area agencies on aging designated for each planning and service area, if appropriate.

(e) Provision of prior Federal fiscal year information related to low income minority and rural older individuals as required by sections 307(a)(23) and (29) of the Act.

(f) Each of the assurances and provisions required in sections 305 and 307 of the Act, and provisions that the State meets each of the requirements under §§ 1321.5 through 1321.75 of this Part, and the following assurances as prescribed by the Commissioner:

(1) Each area agency engages solely in activities which are consistent with its statutory mission as prescribed in the Act and as specified in State policies under § 1321.11;

(2) Preference is given to older persons in greatest social or economic need in the provision of services under the plan;

(3) Procedures exist to ensure that all services under this Part are provided without use of any means tests;

(4) All services provided under Title III meet any existing State and local licensing, health and safety

requirements for the provision of those services;

(5) Older persons are provided opportunities to contribute voluntarily to the cost of services;

(6) Area plans shall specify as submitted, or be amended annually to include, details of the amount of funds expended for each priority service during the past fiscal year;

(7) The State agency on aging shall develop policies governing all aspects of programs operated under this part, including the manner in which the ombudsman program operates at the State level and the relation of the ombudsman program to area agencies where area agencies have been designated;

(8) The State agency will require area agencies on aging to arrange for outreach at the community level that identifies individuals eligible for assistance under this Act and other programs, both public and private, and informs them of the availability of assistance. The outreach efforts shall place special emphasis on reaching older individuals with the greatest economic or social needs with particular attention to low income minority individuals;

(9) The State agency shall have and employ appropriate procedures for data collection from area agencies on aging to permit the State to compile and transmit to the Commissioner accurate and timely statewide data requested by the Commissioner in such form as the Commissioner directs; and

(10) If the State agency proposes to use funds received under section 303(f) of the Act for services other than those for preventive health specified in section 361, the State plan shall demonstrate the unmet need for the services and explain how the services are appropriate to improve the quality of life of older individuals, particularly those with greatest economic or social need, with special attention to low-income minorities.

(11) Area agencies shall compile available information, with necessary supplementation, on courses of post-secondary education offered to older individuals with little or no tuition. The assurance shall include a commitment by the area agencies to make a summary of the information available to older individuals at multipurpose senior centers, congregate nutrition sites, and in other appropriate places.

(12) Individuals with disabilities that reside in a non-institutional household with and accompany a person eligible for congregate meals under this Part shall be provided a meal on the same

basis that meals are provided to volunteers pursuant to section 307(a)(13)(I) of the Act.

§ 1321.19 Amendments to the State plan.

(a) A State shall amend the State plan whenever necessary to reflect:

(1) New or revised Federal statutes or regulations.

(2) A material change in any law, organization, policy or State agency operation, or

(3) Information required annually by sections 307(a)(23) and (29) of the Act.

(b) Information required by paragraph (a)(3) of this section shall be submitted according to guidelines prescribed by the Commissioner.

(c) If a State intends to amend provisions of its plan required under § 1321.17(a) or (f), it shall submit its proposed amendment to the Commissioner for approval. If the State changes any of the provisions of its plan required under § 1321.17(b) through (d), it shall amend the plan and notify the Commissioner. A State need only submit the amended portions of the plan.

§ 1321.21 Submission of the State plan or plan amendment to the Commissioner for approval.

Each State plan, or plan amendment which requires approval of the Commissioner, shall be signed by the Governor or the Governor's designee and submitted to the Commissioner to be considered for approval at least 45 calendar days before the proposed effective date of the plan or plan amendment.

§ 1321.23 Notification of State plan or State plan amendment approval.

(a) The Commissioner approves a State plan or State plan amendment by notifying the Governor or the Governor's designee in writing.

(b) When the Commissioner proposes to disapprove a State plan or amendment, the Commissioner notifies the Governor in writing, giving the reasons for the proposed disapproval, and informs the State agency that it has 60 days to request a hearing on the proposed disapproval following the procedures specified in Subpart E.

(c) Any applicant under paragraph (a) of this section whose application for designation as a planning and service area is denied by a State agency may appeal the denial to the State agency, under procedures specified by the State agency.

(d) If the State denies an applicant for designation as a planning and service area under paragraph (a) of this section, the State shall provide a hearing on the denial of the application, if requested by

the applicant, as well as issue a written decision.

§ 1321.25 Restriction of delegation of authority to other agencies.

A State or area agency may not delegate to another agency the authority to award or administer funds under this part.

§ 1321.27 Public participation.

The State agency shall have a mechanism to obtain and shall consider the views of older persons and the public in developing and administering the State plan.

§ 1321.29 Designation of planning and service areas.

(a) Any unit of general purpose local government, region within a State recognized for area wide planning, metropolitan area, or Indian reservation may make application to the State agency to be designated as a planning and service area, in accordance with State agency procedures.

(b) A State agency shall approve or disapprove any application submitted under paragraph (a) of this section.

§ 1321.31 Appeal to Commissioner.

This section sets forth the procedures the Commissioner follows for providing hearings to applicants for designation as a planning and service area, under § 1321.29(a), whose application is denied by the State agency.

(a) Any applicant for designation as a planning and service area under § 1321.29(a) whose application is denied, and who has been provided a hearing and a written decision by the State agency, may appeal the denial to the Commissioner in writing within 30 days following receipt of a State's hearing decision.

(b) The Commissioner holds a hearing, and issues a written decision, within 60 days following receipt of an applicant's written request to appeal the State agency hearing decision to deny the applicant's request under § 1321.29(a).

(c) When the Commissioner receives an appeal, the Commissioner requests the State Agency to submit:

(1) A copy of the applicant's application for designation as a planning and service area;

(2) A copy of the written decision of the State; and

(3) Any other relevant information the Commissioner may require.

(d) The procedures for the appeal consist of:

(1) Prior written notice of the applicant and the State agency of the date, time and location of the hearing;

(2) The required attendance of the head of the State agency or designated representatives;

(3) An opportunity for the applicant to be represented by counsel or other representative; and

(4) An opportunity for the applicant to be heard in person and to present documentary evidence.

(e) The Commissioner may:

(1) Deny the appeal and uphold the decision of a State agency;

(2) Uphold the appeal and require a State agency to designate the applicant as a planning and service area; or

(3) Take other appropriate action, including negotiating between the parties or remanding the appeal to the State agency after initial findings.

(f) The Commissioner upholds the decision of the State agency if it followed the procedures specified in § 1321.29, and the hearing decision is not manifestly inconsistent with the purpose of this part.

(g) The Commissioner's decision to uphold the decision of a State agency does not extend beyond the period of the approved State plan.

§ 1321.33 Designation of area agencies.

An area agency may be any of the types of agencies under section 305(c) of the Act. A State may not designate any regional or local office of the State as an area agency. However, when a new area agency on aging is designated, the State shall give right of first refusal to a unit of general purpose local government as required in section 305(b)(5)(B) of the Act. If the unit of general purpose local government chooses not to exercise this right, the State shall then give preference to an established office on aging as required in section 305(c)(5) of the Act.

§ 1321.35 Withdrawal of area agency designation.

(a) In carrying out section 305 of the Act, the State agency shall withdraw the area agency designation whenever it, after reasonable notice and opportunity for a hearing, finds that:

(1) An area agency does not meet the requirements of this Part;

(2) An area plan or plan amendment is not approved;

(3) There is substantial failure in the provisions or administration of an approved area plan to comply with any provision of the Act or of this part or policies and procedures established and published by the State agency on aging; or

(4) Activities of the area agency are inconsistent with the statutory mission prescribed in the Act or in conflict with

the requirement of the Act that it function only as an area agency on aging.

(b) If a State agency withdraws an area agency's designation under paragraph (a) of this section it shall:

(1) Provide a plan for the continuity of area agency functions and services in the affected planning and service area; and

(2) Designate a new area agency in the planning and service area in a timely manner.

(c) If necessary to ensure continuity of services in a planning and service area, the State agency may, for a period of up to 180 days after its final decision to withdraw designation of an area agency:

(1) Perform the responsibilities of the area agency; or
(2) Assign the responsibilities of the area agency to another agency in the planning and service area.

(d) The Commissioner may extend the 180 day period if a State agency:

(1) Notifies the Commissioner in writing of its action under paragraph (c);
(2) Requests an extension; and
(3) Demonstrates to the satisfaction of the Commissioner a need for the extension.

§ 1321.37 Intrastate funding formula.

(a) The State agency, after consultation with all area agencies in the State, shall develop and use an intrastate funding formula for the allocation of funds to area agencies under this part. The State agency shall publish the formula for review and comment by older persons, other appropriate agencies and organizations and the general public. The formula shall reflect the proportion among the planning and service areas of persons age 60 and over in greatest economic or social need with particular attention to low-income minority individuals. The State agency shall review and update its formula as often as a new State plan is submitted for approval.

(b) The intrastate funding formula shall provide for a separate allocation of funds received under section 303(f) for preventive health services. In the award of such funds to selected planning and service areas, the State agency shall give priority to areas of the State:

(1) Which are medically underserved; and

(2) In which there are large numbers of individuals who have the greatest economic and social need for such services.

§ 1321.41 Single State planning and service area.

(a) The Commissioner approves the application of a State which was, on or

before October 1, 1980, a single planning and service area, to continue as a single planning and service area if the State agency demonstrates that:

(1) The State is not already divided for purposes of planning and administering human services; or

(2) The State is so small or rural that the purposes of this Part would be impeded if the State were divided into planning and services areas; and

(3) The State agency has the capacity to carry out the responsibilities of an area agency, as specified in the Act.

(b) Prior to the Commissioner's approval for a State to continue as single planning and service area, all the requirements and procedures in § 1321.29 shall be met.

(c) If the Commissioner approves a State's application under paragraph (a) of this section:

(1) The Commissioner notifies the State agency to develop a single State planning and service area plan which meets the requirements of section 306 and 307 of the Act.

(2) A State agency shall meet all the State and area agency function requirements specified in the Act.

(d) If the Commissioner denies the application because a State fails to meet the criteria or requirements set forth in paragraphs (a) or (b) of this section, the Commissioner notifies the State that it shall follow procedures in section 305(A)(1)(E) of the Act to divide the State into planning and service areas.

§ 1321.43 Interstate planning and service area.

(a) Before requesting permission of the Commissioner to designate an interstate planning and service area, the Governor of each State shall execute a written agreement that specifies the State agency proposed to have lead responsibility for administering the programs within the interstate planning and service area and lists the conditions, agreed upon by each State governing the administration of the interstate planning and service area.

(b) The lead State shall request permission of the Commissioner to designate an interstate planning and service area.

(c) The lead State shall submit the request together with a copy of the agreement as part of its State plan or as an amendment to its State plan.

(d) Prior to the Commissioner's approval for States to designate an interstate planning and service area, all applicable requirements and procedures in § 1321.29 and § 1321.33 of this part shall be met.

(e) If the request is approved, the Commissioner, based on the agreement

between the States, increases the allotment of the State with lead responsibility for administering the programs within the area and reduces the allotment(s) of the State(s) without lead responsibility by one of these methods:

(1) Reallotment of funds in proportion to the number of individuals age 60 and over for that portion of the interstate planning and service area located in the State without lead responsibility; or

(2) Reallotment of funds based on the intrastate funding formula of the State(s) without lead responsibility.

§ 1321.45 Transfer between congregate and home-delivered nutrition service allotments.

(a) A State agency, without the approval of the Commissioner, may transfer between allotments up to 30 percent of a State's separate allotments for congregate and home-delivered nutrition services.

(b) A State agency may apply to the Commissioner to transfer from one allotment to the other a portion exceeding 30 percent of a State's separate allotments for congregate and home-delivered nutrition services. A State agency shall:

(1) Specify the percent which a State agency proposes to transfer from one allotment to the other;

(2) Specify whether the proposed transfer is for the entire period of a State plan or a portion of a plan period; and

(3) Specify the purpose of the proposed transfer.

§ 1321.47 Statewide non-Federal share requirements.

The statewide non-Federal share for State or area plan administration shall not be less than 25 percent of the funds used under this part. All services statewide, including ombudsman services and services funded under Title III-B, C, D, E and F, shall be funded on a statewide basis with a non-Federal share of not less than 15 percent. Matching requirements for individual area agencies are determined by the State agency.

§ 1321.49 State agency maintenance of effort.

In order to avoid a penalty, each fiscal year the State agency, to meet the required non-Federal share applicable to its allotments under this part, shall spend under the State plan for both services and administration at least the average amount of State funds it spent under the plan for the three previous fiscal years. If the State agency spends less than this amount, the Commissioner reduces the State's allotments for

supportive and nutrition services under this Part by a percentage equal to the percentage by which the State reduced its expenditures.

§ 1321.51 Confidentiality and disclosure of information.

(a) A State agency shall have procedures to protect the confidentiality of information about older persons collected in the conduct of its responsibilities. The procedures shall ensure that no information about an older person, or obtained from an older person by a service provider or the State or area agencies, is disclosed by the provider or agency in a form that identifies the person without the informed consent of the person or of his or her legal representative, unless the disclosure is required by court order, or for program monitoring by authorized Federal, State, or local monitoring agencies.

(b) A State agency is not required to disclose those types of information or documents that are exempt from disclosure by a Federal agency under the Federal Freedom of Information Act, 5 U.S.C. 552.

(c) A State or area agency on aging may not require a provider of legal assistance under this Part to reveal any information that is protected by attorney client privilege.

(d) The director of the State agency, or other legitimately authorized superior of the State ombudsman and of representatives of the Ombudsman Office, as specified in State policies under § 1321.17(f)(6), shall have access to the files of the State ombudsman or representatives of the Office in order to carry out the State's responsibilities for the ombudsman program.

§ 1321.52 Evaluation of unmet need.

Each State shall submit objective and statistically valid data with evaluative conclusions concerning the unmet need for supportive services, nutrition services, and multipurpose senior centers gathered pursuant to section 307(a)(3)(A) of the Act to the Commissioner. The evaluations for each State shall consider all services in these categories regardless of the source of funding for the services. This information shall be submitted not later than June 30, 1980, and shall conform to guidance issued by the Commissioner.

Subpart C—Area Agency Responsibilities

§ 1321.53 Mission of the area agency.

(a) The Older Americans Act intends that the area agency on aging shall be the leader relative to all aging issues on

behalf of all older persons in the planning and service area. This means that the area agency shall proactively carry out, under the leadership and direction of the State agency, a wide range of functions related to advocacy, planning, coordination, inter-agency linkages, information sharing, brokering, monitoring and evaluation, designed to lead to the development or enhancement of comprehensive and coordinated community based systems in, or serving, each community in the planning and service area. These systems shall be designed to assist older persons in leading independent, meaningful and dignified lives in their own homes and communities as long as possible.

(b) A comprehensive and coordinated community based system described in (a) of this section shall:

(1) Have a visible focal point of contact where anyone can go or call for help, information or referral on any aging issue;

(2) Provide a range of options;

(3) Assure that these options are readily accessible to all older persons: the independent, semi-dependent and totally dependent, no matter what their income;

(4) Include a commitment of public, private, voluntary and personal resources committed to supporting the system;

(5) Involve collaborative decision-making among public, private, voluntary, religious and fraternal organizations and older people in the community;

(6) Offer special help or targeted resources for the most vulnerable older persons, those in danger of losing their independence;

(7) Provide effective referral from agency to agency to assure that information or assistance is received, no matter how or where contact is made in the community;

(8) Evidence sufficient flexibility to respond with appropriate individualized assistance, especially for the vulnerable older person;

(9) Have a unique character which is tailored to the specific nature of the community;

(10) Be directed by leaders in the community who have the respect, capacity and authority necessary to convene all interested persons, assess needs, design solutions, track overall success, stimulate change and plan community responses for the present and for the future.

(c) The resources made available to the area agency on aging under the Older Americans Act are to be used to finance those activities necessary to achieve elements of a community based system set forth in paragraph (b) of this

section. For the purpose of ensuring access to information and services for older persons, the area agency shall work with community leadership in the planning and service area to designate one or more focal points on aging in each community, as appropriate. The area agency shall list designated focal points in the area plan. It shall be the responsibility of the area agency, with the approval of the State agency, to define "community" for the purposes of this section. Since the Older Americans Act defines focal point as a "facility" established to encourage the maximum collocation and coordination of services for older individuals, special consideration shall be given to developing and/or designating multi-purpose senior centers as community focal points on aging. The area agency on aging shall assure that services financed under the Older Americans Act in, or on behalf of, the community will be either based at, linked to or coordinated with the focal points designated. The area agency on aging shall assure access from the designated focal points to services financed under the Older Americans Act. The area agency on aging shall work with, or work to assure that community leadership works with, other applicable agencies and institutions in the community to achieve maximum collocation at, coordination with or access to other services and opportunities for the elderly from the designated community focal points. The area agency may not engage in any activity which is inconsistent with its statutory mission prescribed in the Act or policies prescribed by the State under § 1321.11.

§ 1321.55 Organization and staffing of the area agency.

(a) An area agency may be either:

(1) An agency whose single purpose is to administer programs for older persons; or

(2) A single organizational unit within a multi-purpose agency which functions only for purposes of serving as the area agency on aging.

(b) The area agency, once designated, is responsible for providing for adequate and qualified staff to perform all of the functions prescribed in this part.

(c) The designated area agency continues to function in that capacity until either:

(1) The area agency informs the State agency that it no longer wishes to carry out the responsibilities of an area agency; or

(2) The State agency withdraws the designation of the area agency as provided in § 1321.35.

§ 1321.57 Area agency advisory council.

(a) *Functions of council.* The area agency shall establish an advisory council. The council shall carry out functions which further the area agency's mission of developing and coordinating community-based systems of services for all older persons in the planning and service area. The council shall advise the agency relative to:

(1) Developing and administering the area plan;

(2) Conducting public hearings;

(3) Representing the interest of older persons; and

(4) Reviewing and commenting on all community policies, programs and actions which affect older persons with the intent of assuring maximum coordination and responsiveness to older persons.

(b) *Composition of council.* The council shall include individuals and representatives of community organizations who will help to enhance the leadership role of the area agency in developing community-based systems of services. The advisory council shall be made up of:

(1) More than 50 percent older persons, including minority individuals who are participants or who are eligible to participate in programs under this part;

(2) Representatives of older persons;

(3) Representatives of health care provider organizations, including providers of veterans' health care (if appropriate);

(4) Representatives of supportive services providers organizations;

(5) Persons with leadership experience in the private and voluntary sectors;

(6) Local elected officials; and

(7) The general public.

(c) *Review by advisory council.* The area agency shall submit the area plan and amendments for review and comment to the advisory council before it is transmitted to the State agency for approval.

§ 1321.59 Submission of an area plan and plan amendments to the State for approval.

The area agency shall submit the area plan and amendments to the State agency for approval following procedures specified by the State agency in the State policy manual prescribed by § 1321.17.

§ 1321.61 Advocacy responsibilities of the area agency.

(a) The area agency shall serve as the public advocate for the development or

enhancement of comprehensive and coordinated community-based systems of services in each community throughout the planning and service area.

(b) In carrying out this responsibility, the area agency shall:

(1) Monitor, evaluate, and, where appropriate, comment on all policies, programs, hearings, levies, and community actions which affect older persons;

(2) Solicit comments from the public on the needs of older persons;

(3) Represent the interests of older persons to local level and executive branch officials, public and private agencies or organizations;

(4) Consult with and support the State's long-term care ombudsman program; and

(5) Undertake activities on a regular basis designed to facilitate the coordination of plans and activities with all other public and private organizations, including units of general purpose local government, with responsibilities affecting older persons in the planning and service area to promote new or expanded benefits and opportunities for older persons; and

(c) Each area agency on aging shall undertake a leadership role in assisting communities throughout the planning and service area to target resources from all appropriate sources to meet the needs of older persons with greatest economic or social need, with particular attention to low income minority individuals. Such activities may include location of services and specialization in the types of services most needed by these groups to meet this requirement. However, the area agency may not permit a grantee or contractor under this Part to employ a means test.

(d) No requirements of this section shall be deemed to supersede statutory or other regulatory restrictions regarding lobbying or political advocacy with Federal funds.

Subpart D—Service Requirements

§ 1321.63 Purpose of service allotments under Title III.

(a) Title III of the Older Americans Act authorizes the distribution of Federal funds to the State agency on aging by formula for the following categories of services:

(1) Supportive services;

(2) Congregate meals services;

(3) Home delivered meals services;

(4) In-home services;

(5) Ombudsman services;

(6) Special needs services;

(7) Elder abuse services;

(8) Preventive health services.

Funds authorized under these categories are for the purpose of assisting the State agency to develop or enhance comprehensive and coordinated community based systems for older persons described in 1321.53(b) throughout the State.

(b) Except for ombudsman services, State agencies on aging award the funds made available under paragraph (a) above to designated area agencies on aging in keeping with the formula determined by the State agency. Except where a waiver is granted by the State agency, area agencies shall award these funds by grant or contract to community services provider agencies and organizations. All funds awarded to area agencies under this Part are for the purpose of assisting area agencies to develop or enhance comprehensive and coordinated community based systems for older persons in, or serving, communities throughout the planning and service area.

§ 1321.65 Responsibilities of service providers under area plans.

As a condition for receipt of funds under this part, each area agency on aging shall assure that providers of services shall:

(a) Provide the area agency, in a timely manner, with statistical and other information which the area agency requires in order to meet its planning, coordination, evaluation and reporting requirements established by the State under § 1321.13;

(b) Specify how the provider intends to satisfy the service needs of low-income minority individuals in the area served, including attempting to provide services to low-income minority individuals at least in proportion to the number of low-income minority older persons in the population served by the provider;

(c) Provide recipients with an opportunity to contribute to the cost of the service as provided in § 1321.67;

(d) With the consent of the older person, or his or her representative, bring to the attention of appropriate officials for follow-up, conditions or circumstances which place the older person, or the household of the older person, in imminent danger;

(e) Where feasible and appropriate, make arrangements for the availability of services to older persons in weather related emergencies;

(f) Assist participants in taking advantage of benefits under other programs; and

(g) Assure that all services funded under this Part are coordinated with other appropriate services in the

community, and that these services do not constitute an unnecessary duplication of services provided by other sources.

§ 1321.67 Service contributions.

For services rendered with funding under the Older Americans Act, the area agency on aging shall assure that:

- (a) Each service provider shall:
 - (1) Provide each older person with an opportunity to contribute voluntarily to the cost of the service;
 - (2) Protect the privacy of each older person with respect to his or her contributions;
 - (3) Establish appropriate procedures to safeguard and account for all contributions;
 - (4) Use all supportive services contributions only to expand the services provided under this part; and
 - (5) Use all nutrition services contributions only to expand services as provided under section 307(a)(13)(C)(ii) of the Act.

(b) Each service provider under the Older Americans Act may develop a suggested contribution schedule for services provided under this part. In developing a contribution schedule, the provider shall consider the income ranges of older persons in the community and the provider's other sources of income. However, means tests may not be used for any service supported with funds under this part. State agencies, in developing State eligibility criteria for in-home services under section 343 of the Act, may not include a means test as an eligibility criterion.

(c) A service provider that receives funds under this part may not deny any older person a service because the older person will not or cannot contribute to the cost of the service.

§ 1321.69 Service priority for frail, homebound or isolated elderly.

(a) Persons age 60 or over who are frail, homebound by reason of illness or incapacitating disability, or otherwise isolated, shall be given priority in the delivery of services under this part.

(b) The spouse of the older person, regardless of age or condition, may receive a home-delivered meal if, according to criteria determined by the area agency, receipt of the meal is in the best interest of the homebound older person.

§ 1321.71 Legal assistance.

(a) The provisions and restrictions in this section apply only to legal assistance providers and only if they are providing legal assistance under section 307(a)(15) of the Act.

(b) Nothing in this section is intended to prohibit any attorney from providing any form of legal assistance to an eligible client, or to interfere with the fulfillment of any attorney's professional responsibilities to a client.

(c) The area agency shall award funds to the legal assistance provider(s) that most fully meet the standards in this subsection. The legal assistance provider(s) shall:

(1) Have staff with expertise in specific areas of law affecting older persons in economic or social need, for example, public benefits, institutionalization and alternatives to institutionalization;

(2) Demonstrate the capacity to provide effective administrative and judicial representation in the areas of law affecting older persons with economic or social need;

(3) Demonstrate the capacity to provide support to other advocacy efforts, for example, the long-term care ombudsman program;

(4) Demonstrate the capacity to deliver legal services to institutionalized, isolated, and homebound older individuals effectively; and

(5) Demonstrate the capacity to provide legal assistance in the principal language spoken by clients in areas where a significant number of clients do not speak English as their principal language.

(d) A legal assistance provider may not require an older person to disclose information about income or resources as a condition for providing legal assistance under this part.

(e) A legal assistance provider may ask about the person's financial circumstances as a part of the process of providing legal advice, counseling and representation, or for the purpose of identifying additional resources and benefits for which an older person may be eligible.

(f) A legal assistance provider and its attorneys may engage in other legal activities to the extent that there is no conflict of interest nor other interference with their professional responsibilities under this Act.

(g) No provider shall use funds received under the Act to provide legal assistance in a fee generating case unless other adequate representation is unavailable or there is an emergency requiring immediate legal action. All providers shall establish procedures for the referral of fee generating cases.

(1) "Fee generating case" means any case or matter which, if undertaken on behalf of an eligible client by an attorney in private practice, reasonably may be expected to result in a fee for

legal services from an award to a client, from public funds, or from the opposing party.

(2) Other adequate representation is deemed to be unavailable when:

(i) Recovery of damages is not the principal object of the client; or

(ii) A court appoints a provider or an employee of a provider pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction; or

(iii) An eligible client is seeking benefits under Title II of the Social Security Act, 42 U.S.C. 401, et seq., Federal Old Age, Survivors, and Disability Insurance Benefits; or Title XVI of the Social Security Act, 42 U.S.C. 1381, et seq., Supplemental Security Income for Aged, Blind, and Disabled.

(3) A provider may seek and accept a fee awarded or approved by a court or administrative body, or included in a settlement.

(4) When a case or matter accepted in accordance with this section results in a recovery of damages, other than statutory benefits, a provider may accept reimbursement from out-of-pocket costs and expenses incurred in connection with the case or matter.

(h) A provider, employee of the provider, or staff attorney shall not engage in the following prohibited political activities:

(1) No provider or its employees shall contribute or make available Older Americans Act funds, personnel or equipment to any political party or association or to the campaign of any candidate for public or party office; or for use in advocating or opposing any ballot measure, initiative, or referendum;

(2) No provider or its employees shall intentionally identify the Title III program or provider with any partisan or nonpartisan political activity, or with the campaign of any candidate for public or party office;

(3) While engaged in legal assistance activities supported under the Act, no attorney shall engage in any political activity;

(i) No funds made available under the Act shall be used for lobbying activities, including but not limited to any activities intended to influence any decision or activity by a nonjudicial Federal, State or local individual or body.

(1) Nothing in this section is intended to prohibit an employee from:

(i) Communicating with a governmental agency for the purpose of obtaining information, clarification, or interpretation of the agency's rules, regulations, practices, or policies;

(ii) Informing a client about a new or proposed statute, executive order, or administrative regulation consistent with the requirements of paragraph (k) of this section;

(iii) Responding to an individual client's request for advice only with respect to the client's own communications to officials unless otherwise prohibited by the Older Americans Act, Title III regulations or other applicable law. This provision does not authorize publication or training of clients on lobbying techniques or the composition of a communication for the client's use; or

(iv) Making direct contact with the area agency for any purpose.

(2) A provider may use funds provided by private sources to:

(i) Engage in lobbying activities if a government agency, elected official, legislative body, committee, or member thereof is considering a measure directly affecting activities of the provider under the Act.

(ii) Pay reasonable annual dues to organizations which are tax exempt under section 501(c) of the Internal Revenue Code, provided, however, that such funds may be used only for purposes otherwise permitted by the Act and all regulations adopted pursuant thereto.

(j) While carrying out legal assistance activities and while using resources provided under the Act, by private entities or by a recipient, directly or through a subrecipient, no provider or its employees shall:

(1) Participate in any public demonstration, picketing, boycott, or strike, except as permitted by law in connection with the employee's own employment situation; or

(2) Encourage, direct, or coerce others to engage in such activities.

(3) At any time engage in or encourage others to engage in:

(i) Any illegal activity; or

(ii) Any intentional identification of programs funded under the Act or

recipient with any political activity.

(k) None of the funds made available under the Act may be used to pay dues exceeding \$100 per recipient per annum to any organization (other than a bar association), a purpose or function of which is to engage in activities prohibited under these regulations unless such dues are not used to engage in activities for which Older Americans Act funds cannot be directly used.

§ 1321.73 Grant related income under Title III-C.

The use of grant related income under section 307(a)(13)(c)(ii) of the Act is governed by Title 45 Code of Federal

Regulations Part 74 Subpart F, § 74.42, except that the use of program income as discussed in § 74.42(c), deductive alternative, is not permitted.

§ 1321.75 License and safety.

The State shall ensure:

(a) That, in making awards for multipurpose senior center activities, the area agency will ensure that the facility complies with all applicable State and local health, fire, safety, building, zoning and sanitation laws, ordinances or codes; and

(b) The technical adequacy of any proposed alteration or renovation of a multipurpose senior center assisted under this part, by requiring that any alteration or renovation of a multipurpose senior center that affects the load bearing members of the facility is structurally sound and complies with all applicable local or State ordinances, laws, or building codes.

Subpart E—Hearing Procedures for State Agencies

§ 1321.77 Scope.

(a) Hearing procedures for State plan disapproval, as provided for in section 307(c) and section 307(d) of the Act are subject to the provisions of 45 CFR Part 213 with the following exceptions:

(1) Section 213.1(a), § 213.32(d); and § 231.33 do not apply.

(2) Reference to SRS Hearing Clerk shall be read to mean HHS Hearing Clerk.

(3) References to Administrator shall be read to mean Commissioner on Aging.

(b) Instead of the scope described in § 213.1(a), hearing procedures described in this subpart apply to nature and opportunity for a hearing on:

(1) Disapproval of a State plan or amendment;

(2) Determination that a State agency does not meet the requirements of this part;

(3) Determination that there is a failure in the provisions or the administration of an approved plan to comply substantially with Federal requirements, including the failure to comply with any assurance required under the Act or under this part.

§ 1321.79 When a decision is effective.

(a) The Commissioner's decision specifies the effective date for AoA's reduction and withholding of the State's grant. This effective date may not be earlier than the date of the Commissioner's decision or later than the first date of the Commissioner's decision or later than the first day of the next calendar quarter.

(b) The decision remains in effect unless reversed or stayed on judicial appeal, or until the agency or the plan is changed to meet all Federal requirements, except that the Commissioner may modify or set aside his or her decision before the record of the proceedings under this subpart is filed in court.

§ 1321.81 How the State may appeal.

A State may appeal to the U.S. Court of Appeals which has jurisdiction in the State the final decision of the Commissioner disapproving the State plan or amendment, finding noncompliance, or finding that a State agency does not meet the requirements of this part. The State shall file the appeal within 30 days of the Commissioner's final decision.

§ 1321.83 How the Commissioner may reallocate the State's withheld payments.

The Commissioner disburses funds withheld from the State directly to any public or nonprofit organization or agency, or political subdivision of the State agency and submits a State plan which meets the requirements of this Part and which contains an agreement to meet the non-federal share requirements.

2. Part 1326 is redesignated as Part 1326 and revised to read as follows:

PART 1326—GRANTS TO INDIAN TRIBES FOR SUPPORT AND NUTRITIONAL SERVICES

Sec.

1326.1 Basis and purpose of this part.

1326.3 Definitions.

1326.5 Applicability of other regulations

1326.7 Confidentiality and disclosure of information.

1326.9 Contributions.

1326.11 Prohibition against supplantation.

1326.13 Supportive services.

1326.15 Nutrition services.

1326.17 Access to information.

1326.19 Application requirements.

1326.21 Application approval.

1326.23 Hearing procedures.

Authority: 42 U.S.C. 3001; Title VI, Part A of the Older Americans Act.

§ 1326.1 Basis and purpose of this part.

This program was established to meet the unique needs and circumstances of American Indian elders on Indian reservations.

This Part implements Title VI (Part A) of the Older American Act, as amended, by establishing the requirements that an Indian tribal organization shall meet in order to receive a grant to promote the delivery of services for older Indians that are comparable to services provided under Title III. This part also

prescribes application and hearing requirements and procedures for these grants.

§ 1326.3 Definitions.

"Acquiring," as used in section 307(a)(14) of the Act, means obtaining ownership of an existing facility in fee simple or by lease for 10 years or more for use as a multipurpose senior center.

"Altering" or "renovating" as used in section 307(a)(14) of the Act with respect to multipurpose senior centers, means making modifications to or in connection with an existing facility which are necessary for its effective use as a center. These may include renovation, repair, or expansion which is not in excess of double the square footage of the original facility and all physical improvements.

"Budgeting period," as used in § 1326.19 of this part, means the intervals of time into which a period of assistance (project period) is divided for budgetary and funding purposes.

"Constructing," as used in section 307(a)(14) of the Act with respect to multipurpose senior centers, means building a new facility, including the costs of land acquisition and architectural and engineering fees, or making modifications to or in connection with an existing facility which are in excess of double the square footage of the original facility and all physical improvements.

"Department," means the Department of Health and Human Services.

"Indian reservation," means the reservation of any Federally recognized Indian tribe, including any band, nation, pueblo, or rancheria, any former reservation in Oklahoma, any community on non-trust land under the jurisdiction of an Indian tribe, including a band, nation, pueblo, or rancheria, with allotted lands, or lands subject to a restriction against alienation imposed by the United States, and Alaskan Native regions established, pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688).

"Indian tribe," means any Indian tribe, band, nation, or organized group or community, including any Alaska Native Village, regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) which is recognized as eligible for the special programs and services provided by the United States to Indians because of the status as Indians (25 U.S.C. 450b).

"Means test," as used in the provision of services, means the use of an older Indian's income or resources to deny or limit that person receipt of services under this part.

"Older Indians," means those individuals who have attained the minimum age determined by the tribe for services.

"Project period," as used in § 1326.19 of this part, means the total time for which a project is approved for support, including any extensions.

"Service area," as used in § 1326.9(b) and elsewhere in this part, means that geographic area approved by the Commissioner in which the tribal organization provides supportive and nutritional services to older Indians residing there. A service area may include all or part of the reservation any portion of a county or counties which have a common boundary with the reservation. A service area may also include a non-contiguous area if the designation of such an area will further the purpose of the Act and will provide for more effective administration of the program by the tribal organization.

"Service provider," means any entity that is awarded a subgrant or contract from a tribal organization to provide services under this part.

"Tribal organization," as used in § 1326.7 and elsewhere in this part, means the recognized governing body of any Indian tribe, or any legally established organization of Indians which is controlled, sanctioned or chartered by such governing body or which is a democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities. Provided that in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each Indian tribe shall be a prerequisite to the letting or making of the contract or grant (25 U.S.C. 450b).

§ 1326.5 Applicability of other regulations.
The following regulations in Title 45 of the Code of Federal Regulations apply to all activities under this part:

- (a) Part 16—*Procedures of the Departmental Grant Appeals Board*;
- (b) Part 74—*Administration of Grants*;
- (c) Part 75—*Informal Grant Appeals Procedures*;
- (d) Part 80—*Nondiscrimination Under Programs Receiving Federal Assistance Through the Department of Health and Human Services: Effectuation of Title VI of the Civil Rights Act of 1964*;
- (e) Part 81—*Practice and Procedure for Hearings Under Part 80 of This Title*;
- (f) Part 84—*Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving Benefits from Federal Financial Participation; and*

(g) Part 91—*Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance From HHS*.

§ 1326.7 Confidentiality and disclosure of information.

A tribal organization shall have confidentiality and disclosure procedures as follows:

(a) A tribal organization shall have procedures to ensure that no information about an older Indian or obtained from an older Indian by any provider of services is disclosed by the provider of such services in a form that identifies the person without the informed consent of the person or of his or her legal representative, unless the disclosure is required by court order, or for program monitoring by authorized Federal or tribal monitoring agencies.

(b) A tribal organization is not required to disclose those types of information or documents that are exempt from disclosure by a Federal agency under the Federal Freedom of Information Act, 5 U.S.C. 552.

§ 1326.9 Contributions.

(a) Each tribal organization shall:

(1) Provide each older Indian with a free and voluntary opportunity to contribute to the cost of the service;

(2) Protect the privacy of each older Indian with respect to his or her contribution;

(3) Establish appropriate procedures to safeguard and account for all contributions;

(4) Use all services contributions to expand comprehensive and coordinated services systems supported under this part, while using nutrition services contributions only to expand services as provided under section 307(a)(13)(c)(ii) of the Act.

(b) Each tribal organization may develop a suggested contribution schedule for services provided under this part. In developing a contribution schedule, the tribal organization shall consider the income ranges of older Indians in the service area and the tribal organization's other sources of income. However, means tests may not be used.

(c) A tribal organization that receives funds under this part may not deny any older Indians a service because the older Indian will not or cannot contribute to the cost of the service.

§ 1326.11 Prohibition against supplementation.

A tribal organization shall ensure that the activities provided under a grant under this part will be in addition to, and not in substitution for, comparable activities provided without Federal assistance.

§ 1326.13 Supportive services.

(a) A tribal organization may provide any of the supportive services mentioned under Title III of the Older Americans Act, and any other supportive services that are necessary for the general welfare of older Indians.

(b) If an applicant elects to provide multipurpose senior center activities or uses any of the funds under this part for acquiring, altering or renovating a multipurpose senior center facility, it shall comply with the following requirements:

(1) The tribal organization shall comply with all applicable local health, fire, safety, building, zoning and sanitation laws, ordinances or codes.

(2) The tribal organization shall assure the technical adequacy of any proposed alteration or renovation of a multipurpose senior center assisted under this part. The tribal organization assures technical adequacy by requiring that any alteration or renovation of a multipurpose senior center that affects the load bearing members of the facility is structurally sound and complies with all applicable local or State ordinances, laws, or building codes.

(c) If an applicant elects to provide legal services, it shall substantially comply with the requirements in § 1321.71 and legal services providers shall comply fully with the requirements in §§ 1321.71(c) through 1321.71(p).

§ 1326.15 Nutrition services.

(a) In addition to providing nutrition services to older Indians, a tribal organization may:

(1) Provide nutrition services to the spouses of older Indians;

(2) Provide nutrition services to non-elderly handicapped or disabled Indians who reside in housing facilities occupied primarily by the elderly, at which congregate nutrition services are provided; and

(3) Offer a meal, on the same basis as meals are provided to older Indians, to individuals providing volunteer services during meal hours.

(b) Each tribal organization may receive cash payments in lieu of donated foods for all or any portion of its funding available under section 311(a)(4) of the Act. To receive cash or commodities, the tribal organization shall have an agreement to be a distributing agency with the U.S. Department of Agriculture's Food and Nutrition Service (FNS).

(c) Where applicable, the tribal organization shall work with agencies responsible for administering other programs to facilitate participation of older Indians.

§ 1326.17 Access to information.

A tribal organization shall:

(a) Establish or have a list of all services that are available to older Indians in the service area;

(b) Maintain a list of services needed or requested by the older Indians; and

(c) Provide assistance to older Indians to help them take advantage of available services.

§ 1326.19 Application requirements.

A tribal organization shall have an approved application. The application shall be submitted as prescribed in section 604 of the Act and in accordance with the Commissioner's instructions for the specified project and budget periods. The application shall provide for:

(a) Program objectives, as set forth in section 604(a)(5) of the Act, and any objectives established by the Commissioner.

(b) A description of the geographic boundaries of the service area proposed by the tribal organization;

(c) Documentation of the ability of the tribal organization to deliver supportive and nutrition services to older Indians, or documentation that the tribal organization has effectively administered supportive and nutrition services within the last 3 years;

(d) Assurances as prescribed by the Commissioner that:

(1) A tribal organization represents at least 50 individuals who have attained 60 years of age or older;

(2) A tribal organization shall comply with all applicable State and local license and safety requirements for the provision of those services;

(3) If a substantial number of the older Indians residing in the service area are of limited English-speaking ability, the tribal organization shall utilize the services of workers who are fluent in the language spoke by a predominant number of older Indians;

(4) Procedures to ensure that all services under this Part are provided without use of any means tests; and

(5) A tribal organization shall comply with all requirements set forth in §§ 1326.7 through 1326.17.

(e) A tribal resolution(s) authorizing the tribal organization to apply for a grant under this part; and

(f) Signature by the principal official of the tribe.

§ 1326.21 Application approval.

(a) Approval of any application under section 604(e) of the Act, shall not commit the Commissioner in any way to make additional, supplemental, continuation, or other awards with respect to any approved or portion thereof.

(b) The Commissioner may give first priority in awarding grants to grantees which have effectively administered such grants in the prior year.

§ 1326.23 Hearing procedures.

In meeting the requirements of section 604(d)(3) of the Act, if the Commissioner disapproves an application from an eligible tribal organization, the tribal organization may file a written request for a hearing with the Commissioner.

(a) The request shall be postmarked or delivered in person within 30 days of the date of the disapproval notice. If it requests a hearing, the tribal organization shall submit to the Commissioner, as part of the request, a full written response to each objection specified in the notice of disapproval, including the pertinent facts and reasons in support of its response, and any and all documentation to support its position. Service of the request shall also be made on the individual(s) designated by the Commissioner to represent him or her.

(b) The Administration on Aging shall have the opportunity to respond within 30 days to the merits of the tribal organization's request.

(c) The Commissioner notifies the tribal organization in writing of the date, time and place for the hearing.

(d) The hearing procedures include the right of the tribal organization to:

(1) A hearing before the Commissioner or an official designated by the Commissioner;

(2) Be heard in person or to be represented by counsel, at no expense to the Administration on Aging;

(3) Present written evidence prior to and at the hearing, and present oral evidence at the hearing if the Commissioner or designated official decides that oral evidence is necessary for the proper resolution of the issues involved; and

(4) Have the staff directly responsible for reviewing the application either present at the hearing, or have a deposition from the staff, whichever the Commissioner or designated official decides.

(e) The Commissioner or designated official conducts a fair and impartial hearing, takes all necessary action to avoid delay and to maintain order and has all powers necessary to these ends.

(f) Formal rules of evidence do not apply to the hearings.

(g) The official hearing transcript together with all papers, documents, exhibits, and requests filed in the proceedings, including rulings, constitutes the record for decision.

(h) After consideration of the record, the Commissioner or designated official issues a written decision, based on the record, which sets forth the reasons for the decision and the evidence on which it was based. The decision is issued within 60 days of the date of the hearing, constitutes the final administrative action on the matter and is promptly mailed to the tribal organization.

(i) Either the tribal organization or the staff of the Administration on Aging may request for good cause an extension of any of the time limits specified in this section.

3. A new Part 1328 is added to read as follows:

PART 1328—GRANTS FOR SUPPORTIVE AND NUTRITIONAL SERVICES TO OLDER HAWAIIAN NATIVES

Sec.

- 1328.1 Basis and purpose of this part.
- 1328.3 Definitions.
- 1328.5 Applicability of other regulations.
- 1328.7 Confidentiality and disclosure of information.
- 1328.9 Contributions.
- 1328.11 Prohibition against supplantation.
- 1328.13 Supportive services.
- 1328.15 Nutrition services.
- 1328.17 Access to information.
- 1328.19 Application requirements.
- 1328.21 Application approval.
- 1328.23 Hearing procedures.

Authority: 42 U.S.C. 3001; Title VI Part B of the Older Americans Act.

§ 1328.1 Basis and purpose of this part.

This program was established to meet the unique needs and circumstances of Older Hawaiian Natives.

This part implements Title VI (Part B) of the Older Americans Act, as amended, by establishing the requirements that a public or nonprofit private organization shall meet in order to receive a grant to promote the delivery of services for older Hawaiian Natives that are comparable to services provided under Title III. This part also prescribes application and hearing requirements and procedures for these grants.

§ 1328.3 Definitions.

"Acquiring," as used in section 307(a)(14) of the Act, means obtaining ownership of an existing facility in fee simple or by lease for 10 years or more for use as a multipurpose senior center.

"Act," means the Older Americans Act of 1965, as amended.

"Altering" or "renovating," as used in section 307(a)(14) of the Act with respect to multipurpose senior centers, means making modifications to or in connection with an existing facility which are necessary for its effective use

as a center. These may include renovation, repair, or expansion which is not in excess of double the square footage of the original facility and all physical improvements.

"Budgeting period," as used in § 1328.19 of this part, means the intervals of time into which a period of assistance (project period) is divided for budgetary and funding purposes.

"Constructing," as used in section 307(a)(14) of the Act with respect to multipurpose senior centers, means building a new facility, including the costs of land acquisition and architectural and engineering fees, or making modifications to or in connection with an existing facility which are in excess of double the square footage of the original facility and all physical improvements.

"Department," means the Department of Health and Human Services.

"Eligible organization," means a public or nonprofit private organization having the capacity to provide services under this Part for older Hawaiian Natives.

"Grantee," as used in this part, means an eligible organization that has received funds to provide services to older Hawaiians.

"Hawaiian Native," as used in this part, means any individual any of whose ancestors were natives of the area which consists of the Hawaiian Islands prior to 1778.

"Means test," as used in the provision of services, means the use of an older Hawaiian Native's income or resources to deny or limit that person's receipt of services under this part.

"Older Hawaiian," means any individual, age 60 or over, who is an Hawaiian Native.

"Project period," as used in § 1328.19 of this part, means the total time for which a project is approved for support, including any extensions.

"Service area," as used in § 1328.9(b) and elsewhere in this Part, means that geographic area approved by the Commissioner in which the grantee provides supportive and nutritional services to older Hawaiian Natives residing there.

§ 1328.5 Applicability of other regulations.

Several other regulations apply to all activities under this part. These include but are not limited to:

- (a) Part 16—*Procedures of the Departmental Grant Appeals Board*;
- (b) Part 74—*Administration of Grants*;
- (c) Part 75—*Informal Grant Appeals Procedures*;
- (d) Part 80—*Nondiscrimination Under Programs Receiving Federal Assistance Through the Department of Health and*

Human Services: Effectuation of Title VI of the Civil Rights Act of 1964;

(e) Part 81—*Practice and Procedures for Hearings Under Part 80*;

(f) Part 84—*Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving Benefits From Federal Financial Participation*; and

(g) Part 91—*Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance From HHS*.

§ 1328.7 Confidentiality and disclosure of information.

A grantee shall have confidentiality and disclosure procedures as follows:

(a) The grantee shall have procedures to ensure that no information about an older Hawaiian Native or obtained from an older Hawaiian is disclosed in a form that identifies the person without the informed consent of the person or of his or her legal representative, unless the disclosure is required by court order, or for program monitoring by authorized Federal monitoring agencies.

(b) A grantee is not required to disclose those types of information or documents that are exempt from disclosure by a Federal agency under the Federal Freedom of Information Act, 5 U.S.C. 552.

§ 1328.9 Contributions.

(a) Each grantee shall:

(1) Provide each older Hawaiian Native with a free and voluntary opportunity to contribute to the cost of the service;

(2) Protect the privacy of each older Hawaiian Native with respect to his or her contribution;

(3) Establish appropriate procedures to safeguard and account for all contributions;

(4) Use all supportive services contributions to expand the services provided under this part; and

(5) Use all nutrition services contributions only to expand services as provided under section 307(a)(13)(c)(ii) of the Act.

(b) Each grantee may develop a suggested contribution schedule for services provided under this part. In developing a contribution schedule, the grantee shall consider the income ranges of older Hawaiian Natives in the service area and the grantee's other sources of income. However, means tests may not be used.

(c) A grantee may not deny any older Hawaiian a service because the older Hawaiian will not or cannot contribute to the cost of the service.

§ 1328.11 Prohibition against supplantation.

A grantee shall ensure that the activities provided under a grant under this part will be in addition to, and not in substitution for, comparable activities provided without Federal assistance.

§ 1328.13 Supportive services.

(a) A grantee may provide any of the supportive services mentioned under Title III of the Older Americans Act and any other supportive services, approved in the grantee's application, that are necessary for the general welfare of older Hawaiian Natives.

(b) If a grantee elects to provide multipurpose senior center activities or uses any of the funds under this Part for acquiring, altering or renovating a multipurpose senior center facility, it shall comply with the following requirements:

(1) The grantee shall comply with all applicable local health, fire, safety, building, zoning and sanitation laws, ordinances or codes.

(2) The grantee shall assure the technical adequacy of any proposed alteration or renovation of a multipurpose senior center assisted under this part. The grantee shall assure technical adequacy by requiring that any alteration or renovation of a multipurpose senior center that affects the load bearing members of the facility is structurally sound and complies with all applicable local or State ordinances, laws, or building codes.

(c) If a grantee elects to provide legal services, it shall substantially comply with the requirements in § 1321.75 and legal services providers shall comply fully with the requirements in §§ 1321.71(c) through 1321.71(p).

§ 1328.15 Nutrition services.

(a) In addition to providing nutrition services to older Hawaiian Natives, a grantee may:

(1) Provide nutrition services to the non-elderly spouses of older Hawaiian Natives;

(2) Provide nutrition services to non-elderly handicapped or disabled Hawaiian Natives who reside in housing facilities occupied primarily by the elderly, at which congregate nutrition services are provided; and

(3) Offer a meal, on the same basis as meals are provided to older Hawaiian Natives, to individuals providing volunteer services during meal hours.

(b) Each grantee may receive cash payments in lieu of donated foods for all or any portion of its funding available under section 311(a)(4) of the Act. To receive cash or commodities, the grantee shall have an agreement to be a

distributing agency with the U.S. Department of Agriculture's Food and Nutrition Service (FNS).

(c) Where applicable, the grantee shall work with agencies responsible for administering other programs to facilitate participation of older Hawaiian Natives.

§ 1328.17 Access to information.

A grantee shall:

(a) Establish or have a list of all services that are available to older Hawaiian Natives in the service area;

(b) Maintain a list of services needed or requested by the older Hawaiians; and

(c) Provide assistance to older Hawaiian Natives to help them take advantage of available services.

§ 1328.19 Application requirements.

To receive funds under this part, an eligible organization shall submit an application as prescribed in section 623 of the Act and in accordance with the Commissioner's instructions for the specified project and budget periods. The application shall provide for:

(a) Program objectives, as set forth in section 623(a)(6) of the Act, and any objectives established by the Commissioner;

(b) A description of the geographic boundaries of the service area proposed by the eligible organization;

(c) Documentation of the organization's ability to serve older Hawaiian Natives;

(d) Assurances as prescribed by the Commissioner that:

(1) The eligible organization represents at least 50 older Hawaiian Natives who have attained 60 years of age or older;

(2) The eligible organization shall conduct all activities on behalf of older Hawaiian natives in close coordination with the State Agency and Area Agency on Aging;

(3) The eligible organization shall comply with all applicable State and local license and safety requirements for the provision of those services;

(4) The eligible organization shall ensure that all services under this Part are provided without use of any means tests; and

(5) The eligible organization shall comply with all requirements set forth in §§ 1328.7 through 1328.17.

(e) Signature by the principal official of the eligible organization.

§ 1328.21 Application approval.

(a) Approval of any application under section 623(d) of the Act, shall not commit the Commissioner in any way to make additional, supplemental,

continuation, or other awards with respect to any approved or portion thereof.

(b) The Commissioner may give first priority in awarding grants to eligible applicant organizations that have prior experience in serving Hawaiian Natives, particularly older Hawaiian Natives.

§ 1328.23 Hearing procedures.

In meeting the requirements of section 623(c)(3) of the Act, if the Commissioner disapproves an application from an eligible organization, the organization may file a written request for a hearing with the Commissioner.

(a) The request shall be postmarked or delivered in person within 30 days of the date of the disapproval notice. If it requests hearing, the organization shall submit to the Commissioner, as part of the request, a full written response to each objection specified in the notice of disapproval, including the pertinent facts and reasons in support of its response, and any and all documentation to support its position. Service of the request shall also be made on the individual(s) designated by the Commissioner to represent him or her.

(b) The Administration on Aging shall have the opportunity to respond within 30 days to the merits of the organization's request.

(c) The Commissioner notifies the organization in writing of the date, time and place for the hearing.

(d) The hearing procedures include the right of the organization to:

(1) A hearing before the Commissioner or an official designated by the Commissioner;

(2) Be heard in person or to be represented by counsel, at no expense to the Administration on Aging;

(3) Present written evidence prior to and at the hearing, and present oral evidence at the hearing if the Commissioner or designated official decides that oral evidence is necessary for the proper resolution of the issues involved; and

(4) Have the staff directly responsible for reviewing the application either present at the hearing, or have a deposition from the staff, whichever the Commissioner or designate official decides.

(e) The Commissioner or designated official conducts a fair and impartial hearing, takes all necessary action to avoid delay and to maintain order and has all powers necessary to these ends.

(f) Formal rules of evidence do not apply to the hearings.

(g) The official hearing transcript together with all papers, documents,

exhibits, and requests filed in the proceedings, including rulings, constitutes the record for decision.

(h) After consideration of the record, the Commissioner or designated official issues a written decision, based on the record, which sets forth the reasons for the decision and the evidence on which it was based. The decision is issued within 60 days of the date of the hearing, constitutes the final administrative action on the matter and is promptly mailed to the organization.

(i) Either the organization or the staff of the Administration on Aging may request, for good cause, an extension of any of the time limits specified in this section.

[FR Doc. 88-0577 Filed 3-28-88; 8:45 am]

BILLING CODE 4120-01-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2, 22, 74, and 90

[Gen. Docket No. 85-171; FCC 88-65]

Revisions of the Rules Regarding Equipment Authorization Procedures; Public Mobile Service; Experimental, Auxiliary, and Special Broadcast and Other Program Distributional Services; and Private Land Mobile Radio Services

AGENCY: Federal Communications Commission (FCC).

ACTION: Proposed rules.

SUMMARY: Changes are proposed in Parts 2, 22, 74, and 90 of the Rules to allow use of radio technologies in the land mobile radio bands that do not meet the conventional technical standards of existing mobile radio rules.

The Notice of Inquiry and Proposed Rule Making solicited public comment on an equipment testing and authorization procedure called alternative type acceptance (ATA). By making tests with a "standard" receiver, the compatibility of a new radio technology with existing FM land mobile radio would be assured. While generally agreeing with the concept of ATA, the commenters thought that the "standard" receiver and frequency coordination constituted significant problems.

The present action proposes a different methodology for ATA to deal with the problems raised. This methodology uses characteristics of existing FM land mobile transmitters to define the power and bandwidth of new radio technologies.

DATES: Comments must be received on or before June 20, 1988, and Reply

Comments must be received on or before July 20, 1988.

ADDRESS: Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Hector Davis, Engineering Evaluation Branch, Office of Engineering and Technology, (301) 725-1585.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Further Notice of Proposed Rule Making in Gen. Docket No. 85-171, FCC 88-65, Adopted February 25, 1988, and Released on March 22, 1988.

The full text of the Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Summary of Further Notice of Proposed Rule Making

1. The objective of this proposal is to add alternative type acceptance (ATA) procedures for equipment authorized in the mobile communications services. This action will permit the introduction of new technologies into the existing mobile radio bands without time-consuming rule making proceedings. Applicants using ATA will not have to disclose the technical details of the application to competitors prior to grant as would be the case in a rule making proceeding. The Commission believes that the proposed rules preclude any more interference from new technologies than results from existing mobile services.

2. It should be noted that the use of ATA is optional. Existing type acceptance procedures are retained. Amendments are proposed for Part 2 to include the optional ATA procedures. Parts 22, 74, and 90 are amended to allow the use in the mobile services of equipment authorized under ATA. We believe that the matter of interference to land mobile services has been satisfactorily addressed. Interference to other authorized services should not occur. ATA equipment will not be permitted in UHF television channels shared by land mobile radio services. This restriction is necessary due to the limited testing in this environment.

3. In order to incorporate the above proposals into the rules, a new § 2.990 is added. Changes are required for the following rule sections: 22.120, 74.451, 90.203, 90.217, and 90.221. Comments are

requested on the proposed changes to the rules.

4. This is a non-restricted notice and comment rule making proceeding. See § 1.1231 of the Commission's rules, 47 CFR 1.1231 for rules governing permissible *ex parte* contacts.

5. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 603, the proposed rules will not, if promulgated, have a significant economic impact on a substantial number of small entities because it relaxes the Commission's rules and reduces the Commission's application burden. Public comment is requested on the initial regulatory flexibility analysis set out in full in the Commission's complete decision.

6. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no additional information collection requirement on the public. Implementation of a modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

List of Subjects

47 CFR Part 2

Type acceptance.

47 CFR Part 22

Technical standards.

47 CFR Part 74

Remote pickup broadcast stations.

47 CFR Part 90

General technical standards.

Federal Communications Commission.

H. Walker Foster III,

Acting Secretary.

[FR Doc. 88-0768 Filed 3-28-88; 8:45 am]

BILLING CODE 4712-01-M

47 CFR Part 73

[MM Docket No. 88-108; RM-4997]

Radio Broadcasting Services; Blythe, CA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; dismissal of proposal.

SUMMARY: This document dismisses a proposal to allot Channel 219A to Blythe, California, as requested by the Escuela de la Raza Unida, based on the Commission's recent amendment of its Rules to provide for a "demand" system for NCE-FM services located within 100 miles of the United States-Mexico border area. As a result, the Blythe



**Congressional Research Service
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Washington, D.C. 20540

April 21, 1988

TO : House Select Committee on Aging
Human Services Subcommittee
Attention: Bob Blancato, Majority Staff Director

FROM : Carol O'Shaughnessy
Specialist in Social Legislation
Education and Public Welfare Division

SUBJECT : Analysis of Administration on Aging Proposed Regulations

This is in response to your request for an analysis of the Administration on Aging (AoA) proposed regulations issued in the Federal Register March 29, 1988. The following presents some summary comments on the regulations and raises some issues which may be of concern to certain interested parties.

BACKGROUND

P.L. 100-175, the Older Americans Act Amendments of 1987, requires the Secretary of the Department of Health and Human Services (DHHS) to issue proposed regulations governing the administration of the Act no later than 120 days after the enactment of the law. The law was enacted on November 29, 1987 and the issuance of the regulations in the Federal Register is within the time period specified by the law. The law also requires that final rules be issued within 90 days after proposed rules are published. Comments are being solicited on or before May 31.

The preamble to the regulations indicates that proposed changes fall into the following categories: first, changes to reaffirm the intent of the Act;

second, changes to implement provisions of P.L. 100-175; and third, changes to make technical corrections in the current regulations. The preamble also indicates that comments are being solicited only on those sections which discuss new or revised provisions.

The Administration indicates that regulation development was guided by a number of principles aimed at reducing regulatory burden and providing State and area agencies with greater flexibility to respond to the needs of older persons. These principles include insuring that the regulations are clearly within the authority of law and congressional intent; emphasizing private market forces, rather than government mandate; minimizing Federal, State, local and private costs; and eliminating regulations not serving a compelling Federal interest. The preamble indicates that virtually all of the content of the current regulations (published on April 1, 1985) has been retained.

In these proposed regulations, as in regulations published to implement the 1984 legislation, the Administration has taken an approach which generally does not repeat provisions contained in law. Therefore, for example, the regulations do not contain requirements or provisions for certain services contained in the law, such as requirements for the operation of the nutrition program, discussion of priority supportive service areas, requirements for in-home services for the frail elderly, and elder abuse prevention activities, among others.

The following discussion highlights selected areas which may be of interest in a review of the regulations.

CRS-3

1. Mission of the State Agency on Aging and the Area Agency on Aging

The regulations propose two new sections which are intended to emphasize congressional intent as to program philosophy and goals of title III. In paragraph 1321.7, Mission of the State Agency, and paragraph 1321.53, Mission of the Area Agency, the regulations indicate that the State agency and the area agency shall be the leaders with respect to all aging issues in the State or planning and service area. The regulations go on to state that State and area agencies shall actively carry out a wide range of functions related to advocacy, planning, coordination, interagency linkages, information sharing, brokering, monitoring, and evaluation designed to lead to the development or enhancement of comprehensive and coordinated community-based systems designed to assist older persons in leading independent lives in their own homes and communities as long as possible.

These sections are an expansion of the current regulations and reflect and build upon the goals of title III as set out in section 301 of the law. By including this language it appears that AoA intends to provide a context for the administration of the title III program by State and area agencies and to incorporate legislative responsibilities in the areas of advocacy, planning, and coordination as part of the regulatory framework. This approach may be viewed as a positive one by some observers and an improvement over the current regulations.

2. Advocacy Functions

The regulatory provisions on advocacy retain some of the same language as in the current regulations, but in addition appear to expand upon current law.

CRS-4

a. State agency advocacy functions. Section 305 (a)(1)(D) of the law requires the State agency to "serve as an effective and visible advocate for the elderly by reviewing and commenting upon all State plans, budgets, and policies which affect the elderly" Although the advocacy provisions under title III were the subject of review during the 100th Congress reauthorization process, and the House-passed bill contained language which would have clarified and expanded the advocacy provisions contained in Section 305 (a)(1)(D), the Senate-passed bill, which proposed no change, prevailed. However, it appears that the proposed regulations have incorporated certain aspects of the proposed House bill provisions which were not ultimately enacted. The House bill language would have provided that the State agency serve as an effective and visible advocate:

by reviewing, monitoring, evaluating, and commenting on Federal, State, and local plans, budgets, regulations, programs, laws, levies, hearings, policies and actions which affect or may affect older individuals and by recommending any changes in such local plans, budgets, regulations, programs, laws, levies, hearings, policies, and actions as the State agency considers to be appropriate . . . (section 25 of H.R. 1451, as passed by the House, May 28, 1987).

The proposed regulations, in section 1321.13 (a)(1), contains almost identical language. They would require the State agency to:

review, monitor, evaluate and comment on Federal, State and local plans, budgets, regulations, programs, laws, levies, hearings, policies, and actions which affect or may affect older individuals and recommend any changes in these which the State agency considers to be appropriate; . . .

The proposed regulations on advocacy also retain the language of the current regulations which had been the subject of controversy in the past, as follows:

[no] requirements in this section shall be deemed to supersede statutory or other regulatory restrictions regarding lobbying or political advocacy with Federal funds.

This language has been criticized in the past as causing confusion as to the kinds of allowable or unallowable advocacy activities of State and area agencies. (Statements of concern about this regulatory language were made in the Congressional Record by both Congressman Biaggi and by Senator Grassley in 1985.) Some observers may question the retention of this language in the proposed rule especially in view of conference report language on P.L. 100-175, which, while it indicated that the conferees did not change the law, called attention to the fact that provisions of law cannot be superceded by rule or executive order.^{1/}

b. Area agency advocacy functions. Section 1321.61 of the proposed regulations restates the law provision contained in section 306(a)(6)(D) which requires area agencies to monitor, evaluate, and comment on all policies, programs, hearings, levies, and community actions affecting the elderly. In addition, the regulation retains some of the language of the current regulations requiring area agencies to solicit comments from the public on the needs of older persons and represent the interests of older persons to other community groups. The proposal also adds new sections requiring the area agency to undertake a leadership role in assisting communities to target resources to meet the needs of older persons with economic or social need, with particular attention to low-income minority individuals.

This section also incorporates language cited above on prohibitions on lobbying or political advocacy.

In general, some observers may indicate that the expanded language improves the regulations on advocacy, and clarifies the role of advocacy

^{1/} U.S. Congress. House. Older Americans Act Amendments of 1987. Conference Report No. 100-427. Nov. 9, 1987. p. 72. For statements of Congressman Biaggi and Senator Grassley, see: Congressional Record, July 25, 1985, p. E 3548, and June 21, 1985, p. 8635, respectively.

within the title III framework; however, some observers may again question the meaning of the above-cited prohibition on lobbying or political advocacy.

3. Targeting Provisions

Provisions requiring State and area agencies to target services on those persons in greatest social or economic need were strengthened by P.L. 100-175, including the addition of requirements for documentation of services to specified groups, outreach services, and service provider responsibilities. Various sections of the proposed regulations make reference to title III requirements for targeting of services to those older persons with the greatest economic or social need, with particular attention to the needs of low-income minority older persons. These include the following:

- o in setting out the purpose of title III, the regulations indicate that special emphasis is to be placed on these groups (section 1321.1);
- o in specifying the content of State plans, the regulations require the State plan to identify the number of low-income minority older persons in the State and methods used to satisfy their service needs for the prior Federal fiscal year. The regulations also require State plans to assure that preference be given to persons in greatest social or economic need. Also under this section, area agencies are to arrange outreach services with special emphasis on these groups (section 1321.17);
- o in stating requirements for an intrastate funding formula, the regulations require that the formula reflect the proportion among the planning and service areas of older persons in greatest economic or social need with particular attention to low-income minority individuals (section 1321.37);
- o in setting out the area agency advocacy responsibilities, the regulations require area agencies to undertake a leadership role to meet the needs of persons with the greatest needs, with particular attention to low-income minority older persons (section 1321.61);
- o as a condition for receipt of funds, the regulations require service providers to specify how they intend to satisfy the needs of low-income minority individuals, including efforts to provide

CRS-7

services to this group at least in proportion to their numbers in the planning and service area (section 1321.65).

In addition to these targeting references, the proposed regulations make references to other groups of older persons to be served. First, the regulations explicitly state a facet of the program which has been part of congressional intent but is not currently part of the regulatory issuance, namely, that the program be available to all older persons. Section 1321.53, which sets out the mission of the area agency, states that the program shall offer a range of options which are to be readily accessible to all older persons--the independent, semi-dependent, and totally dependent, no matter what their income. This section also states that the system must offer special or targeted resources for the most vulnerable, those in danger of losing their independence. In addition, section 1321.69, adds a new section, specifying that frail, homebound or isolated elderly are to be given priority for services.

4. Use of Services Funds for Planning and Coordination Activities

Current regulations allow a portion of title III services funds to be used for program development and coordination activities, after the fully allowable amount for administration of area plans has been spent. Under prior law the amount allowed for area agency administration was limited to 8.5 percent of the State's total combined allotments for supportive and nutrition services. The regulation allowing services funds to be used for program development and coordination activities was in part based on the premise that these activities are key functions related to administration of area plans, and that expenditure of funds above the previous administrative funding limit of 8.5 percent might be necessary in certain cases.

CRS-8

P.L. 100-175 increased the allowable area agency administrative cost cap from 8.5 percent to 10 percent of a State's combined services allotments. The proposed regulations indicate that because this limit was raised, program and development activities may no longer be funded out of services funds.

This provision will likely be opposed by some area agencies which have in the past used more than 10 percent of services funds to support their administrative costs, including program development and coordination activities. On the other hand, it might be supported by some service providers which might see it as limiting area agency on aging administrative expenses, thereby freeing more funds for services.

There does not appear to be data on how much area agencies use for area plan administration, including program development and coordination activities.

5. Deletion of Prohibition on State Agency Prior Review of Area Agency Grants and Contracts

Current regulations prohibit State agencies from requiring area agencies to submit for prior review or approval any proposed funding of public or private nonprofit agencies to provide title III services. The proposed regulations delete this prohibition. AoA indicates that this restriction is being eliminated because State policies govern the operational aspects of the program. This deletion may be objectional to some area agencies in that it might allow State agencies to set policies which may interfere with area agency decision-making with respect to award of title III funds. Some may point out that the current regulation prohibiting prior review has been part of the AoA regulations at least since 1980.

6. Other Possible Questions/Issues

1. The 1987 amendments added authority for a number of new service areas to be provided under title III, including outreach services to older persons who may be eligible for benefits under the Supplemental Security Income (SSI), Medicaid, and Food Stamp programs. There is no mention of the outreach program in Subpart D of the regulations, which lists service areas under title III. It is unclear why outreach was not included.

2. The regulations refer to area agencies as "agents" of the State. This terminology may be questioned by some area agencies which in some cases have as much influence as State agencies in some areas of the country.

3. There have been reports that the Commissioner on Aging is concerned about a critical staff shortage in AoA (See attached article from a recent Older Americans Report, for example.) In view of the new requirements for AoA contained in the 1987 reauthorization legislation, and the fact that the staff shortage even predated this legislation, there may be congressional concern about the ability of AoA to carry out its responsibilities and to assist States and area agencies to implement new aspects of the program.

4. The regulations were formally issued by the Office of Human Development Services (OHDS). The intent of the 1987 legislation was to remove AoA from the auspices of OHDS so that the Commissioner on Aging would report directly to the Secretary of DHHS. Although there is apparently an internal DHHS task force reviewing how to make the administrative changes necessary to implement this aspect of the law, some may question why the proposed regulations were issued under authority of OHDS.

Attachment

April 15, 1988

Older Americans Report

Page 155

**FISK SAYS 'CRITICAL STAFF SHORTAGES'
MAY UNDERMINE ABILITY TO CARRY OUT OAA**

A 50% divisional management vacancy exists at the U.S. Administration on Aging and AoA Commissioner Carol Fraser Fisk has expressed her concerns about these "critical staff shortages" to top Health and Human Services Department management. "It is essential that a solution be found as soon as possible, for AoA is rapidly losing the capacity to carry out its assigned mission under the Older Americans Act," Fisk said in an April 7 memorandum to HHS Under Secretary Don Newman.

Fisk blamed the shortages on the hiring "freeze imposed by the assistant secretary" of the Office of Human Development Services and protested that OHDS "lacks the authority to impose hiring restrictions on AoA." Fisk cited Section 201(a) of the Older Americans Act as stating that "The Secretary shall not approve or require any delegation of the functions of the commissioner to any other officer not directly responsible to the commissioner."

"I believe that to prevent the commissioner on aging to exercise authority to fill essential management vacancies in the agency is a violation of the delegation of authority requirement in the act," Fisk wrote.

Fisk noted that she has already "appealed ... unsuccessfully for relief" to the OHDS assistant secretary. "Currently, three divisional management positions are vacant in AoA," she told Newman.

The information came as a surprise to several congressional staffers contacted by OAR. Along with on-going Hill concern about whether Section 201(a) requirements are being implemented, the news of AoA staff shortages may trigger more congressional investigation (OAR, April 1, 1988, p. 131).

**SOCIAL SECURITY ADMINISTRATION SUED
FOR FAILURE TO CREDIT BILLIONS IN WAGES**

The National Committee to Preserve Social Security and Medicare (NCPSSM) filed a lawsuit April 13 against the Social Security Administration (SSA) to force the agency to credit \$58.5 billion in wages to the accounts of 9.7 million individuals. The suit (NCPSSM v. Otis Bowen et al.) was filed in the U.S. District Court for the District of Columbia.

Under the current system for reporting employee earnings, both SSA and the Internal Revenue Service (IRS) receive reports from employers. According to a recent study by the U.S. General Accounting Office (GAO), SSA records reflect about \$58.5 billion less than IRS records for the period between 1978 and 1984. GAO said nearly 9.7 million people, including active workers and retirees, had some earnings wrongly omitted from their SSA records. GAO said the typical retiree had lost an average of \$16.81 a month for 31 months (OAR, March 11, 1988, p. 102).

James Roosevelt, NCPSSM chairman, said that despite "repeated calls for agency action" SSA has failed to reconcile the discrepancies. The suit adds that "SSA has repeatedly denied that resource staffing limitations have been a factor influencing its ability to cope with the reconciliation problem."

The suit quotes a July 1984 internal SSA memorandum about the problem as follows: "Already, many of these wage records are so old that records showing whose earnings they are may be impossible or very difficult to find."

Congress of the United States
House of Representatives
Washington, D.C. 20515

May 31, 1988

Ms. Carol Fraser Fisk
 Commissioner
 Administration on Aging
 Office of Human Development Services
 Department of Health and Human Services
 Washington, D.C.

Dear Commissioner Fisk:

We, the undersigned, as strong supporters of the Older Americans Act Amendments of 1987 (P.L. 100-175) wish to provide you with our comments on the notice of proposed rulemaking 45 CFR Parts 1321, 1326 and 1328. We recognize the critical importance of these regulations to the effective operation of the Older Americans Act over the four years of the latest reauthorization. Therefore, we wish to recommend some important changes in these proposed rules. We also strongly recommend that you issue a notice of interim final rules to permit further review of changes which should be made.

These suggested changes and revisions are based in large measure on testimonies received at the public hearing held by the Subcommittee on Human Services, House Select Committee on Aging on April 26, 1988 where you also presented testimony. The Subcommittee elicited the views of a number of organizations with a direct interest in the Older Americans Act and the regulations. Some of their views are reflected in our comments. Further, others of our comments are based on resolving what appear to be either conflicts or misinterpretations of Congressional intent of certain sections of P.L. 100-175.

The following represent changes we urge be made in the proposed regulations:

Part 1321 GRANTS TO STATE AND COMMUNITY PROGRAMS ON AGING

1) 1321.3 "Definitions"

We urge you to be more specific about the definition of direct services. This represents an addition to the definitions which must be measured against other provisions in the law which bar area agencies from providing direct services. A literal interpretation of this new direct service definition could represent a host of problems for area agencies around the nation who presently provide services which constitute "any activity performed to benefit an older individual."

(more)

-2-

2) 1321.7 MISSION OF THE STATE AGENCY

We specifically call for the deletion of the word "agent" as it appears in (b) and in other subsequent sections of the regulations. We consider the word "agent" to be inimical to the historical relationship between states and area agencies on aging. This relationship has been based on a spirit of partnership and a recognition that area agencies on aging are independent agencies. We recognize that area agencies are designated by the states but for the purpose of developing and implementing local plans for services. Historically, Congressional intent has strongly identified with strong autonomy at all levels of the aging network. The addition of the word "agent" to describe the relationship between state and area agencies on aging is entirely unnecessary and does nothing to enhance existing relationships between states and area agencies. To the contrary, we submit this one word, because of its high susceptibility to being misinterpreted, could be quite disruptive to the future of the Older Americans Act.

3) 1321.13 ADVOCACY RESPONSIBILITIES

We support the language in both this section and later in 1321.61 which specifically identifies what advocacy at the state agency and area agency level should include. This we consider consistent with Congressional intent notwithstanding the fact that it constitutes new language.

However, we strongly oppose the retention from existing regulations of Sections 1321.13 (b) and later 1321.61 (d) which we believe runs directly contrary to Congressional intent. We specifically cite language on page 72 of the Conference Report which accompanied H.R. 1451. It states the conferees "wish to call attention to the fact that provisions of law cannot be superceded by rule or Executive Order." Yet the proposed regulations state "No requirements in this section shall be deemed to supercede statutory or other regulatory restrictions regarding lobbying or political advocacy with Federal funds." This is inconsistent not only with the intent of Congress, but with your own proposed regulations which immediately precede it. Advocacy by all levels in the aging network is crucial to the success of the program. It improves public policy at all levels and helps to enlist greater private support and involvement in programs to help our elderly. Advocacy should not be stifled either by statute or regulation. We reiterate the need to delete Section 1321.13 (b) and 1321.61 (d).

4) 1321.17 CONTENT OF STATE PLAN

We understand that these proposed regulations delete a section of the current regulations which allow a portion of Title III services funds to be used for program development and coordination activities after it has spent 8.5 percent of the total on the administration of area plans. The rationale for the deletion, as we understand it, is based in large measure on the provisions in P.L. 100-175 which increased the allowable area agency administrative cost cap from 8.5 to 10 percent of a state's combined services allotment. The regulations indicate that since this limit was raised, program development and coordination activities may no longer be funded out of services funds.

(more)

We urge that the existing regulations which allow states to use a portion of their services funds for program development and coordination be retained. We urge this for several reasons. First and foremost, it is a distortion of reality to consider program development and coordination funds to be purely "administrative funds." We have received information from scores of area agencies around the country who point to their program development and coordination funds being responsible for the expansion of key services for seniors. These include both congregate and home delivered nutrition services for victims of Alzheimer's Disease and their families. The expansion is achieved through coordination with other public and private programs to achieve additional resources.

We also urge that the existing regulations be retained because the increase from 8.5 to 10 percent for administration will in numerous instances not compensate for the potential loss of program development and coordination funds. Rural areas could be especially impacted because of the small amounts available for administration. This is directly related to the provisions in P.L. 100-175 which authorize additional responsibilities for area agencies on aging including new outreach efforts, information dissemination and reporting requirements aimed at improving targeting. Existing practices in certain states and their area agencies on aging combined with these additional responsibilities lead us to recommend that the existing regulations in this area be retained. They will ensure maximum flexibility at the area agency level. However, we would also urge that language be included recommending that ongoing efforts continue to be made by state and area agencies to obtain more non-Federal resources to offset the costs of administration.

1321.45 TRANSFER BETWEEN CONGREGATE AND HOME DELIVERED NUTRITION SERVICE ALLOTMENTS

We commend you on the language contained in paragraphs (1) and (3) which we believe develops an important new degree of accountability for these funds. We recommend that you regularly monitor this aspect of the program.

1321.51 CONFIDENTIALITY AND DISCLOSURE OF INFORMATION

We are adamantly opposed to (d) of this section which authorizes an unwarranted expansion of those who would have access to the confidential records of long term care residents through having access to the "files of the state ombudsman." Confidentiality of information is one of the most critical components of the ombudsman program. The effective functioning of this program is contingent in many instances on strict adherence to any confidentiality of patient records and information. We see no justification for any expansion of access to these records to any other entity other than the ombudsman.

1321.52 EVALUATION OF UNMET NEED

We urge major revisions in this regulation to more accurately reflect the intent of Congress relative to the objective of this evaluation. There needs to be more specific direction relative to geographical and other factors that may be contributing to unmet need and more direction on recommendations on how to alleviate the unmet need.

(more)

1321.53 MISSION OF THE AREA AGENCY

As with 1321.7, Mission of the State Agency, we question both the direct legislative basis and the overall need for these statements. It has always been understood that both state and area agencies are to function in a manner which allows the goals and objectives of the Older Americans Act to be furthered. We would urge that retention of these two provisions be seriously reconsidered. If they are retained, we would strongly urge that nothing contained in the mission statement be construed to restrict any ongoing activity by an area agency on aging relative to services or inhibit any future creativity of the part of an area agency on aging to obtain additional resources for service delivery. Further, should 1321.53 remain, we would recommend the deletion of the following two sections. The first would be 1321.53 (b)(10). We would find a host of practical problems involved in how to define those community "leaders" and how to measure results. The second would be 1321.53 (c). Our concern here is the extremely broad nature of this language and its implication of shared authority between this vague "community leadership" and the area agency on aging.

1321.55 ORGANIZATION AND STAFFING OF AREA AGENCIES ON AGING

We call for the deletion of this language and a retention of existing regulations. We believe that reliance on the statute and Congressional intent on the issue of an area agency on aging being a single organizational unit will provide more than sufficient guidance. 1321.55 serves to dilute the one critical aspect of Congressional intent which is that an area agency on aging should be a single and identifiable organizational unit in each community where it exists.

1321.63 PURPOSE OF SERVICE ALLOTMENTS UNDER TITLE III

We note with some concern the omission of outreach among the categories of services listed. We maintain that outreach was given special emphasis in P.L. 100-175, and we believe it should be better reflected in the regulations.

In Part (b), we recommend that language from existing regulations which prohibit area agencies from providing direct services except under specified conditions be restated in this section.

1321.65 RESPONSIBILITIES OF SERVICE PROVIDERS UNDER AREA PLANS

We specifically request clarification of the term "or the household of the older person" which appears in (d).

1321.67 SERVICE CONTRIBUTIONS

The issue of service contributions remains of considerable concern. Congressional intent was reaffirmed last year when mandatory cost-sharing requirements for Title III services were rejected. Statute permits voluntary contributions for nutrition services only. These new regulations like those promulgated earlier, however, place no limits on the Title III services for which contributions can be collected.

(more)

As a consequence, our concern is that these regulations actively encourage an expansion of voluntary contributions and therefore raise the potential of misunderstanding and abuse. A literal interpretation of the section would mean that while contributions are voluntary, all service providers must make provisions for a person to contribute. Furthermore, the language in the proposed regulation reads "provide each older person with an opportunity to contribute voluntarily...." We believe that the term should be "voluntarily contribute."

Further, while indicating that contributions for nutrition services can only be used to expand nutrition services, the regulations specifically in (4) are far more vague relative to the use of contributions garnered from other Title III services.

Notwithstanding (c) we are concerned that this service contribution language may limit access of low income and other older persons to necessary services. We also contend that voluntary contributions for nutrition services are relatively easy to establish based on the cost of a meal. However, it is far more difficult to establish a uniform contribution schedule on Title III B services such as in-home services, outreach, and information and referral. The continued absence of data in the impact of mandatory vs. voluntary contributions on access to services and participation rates requires us to reaffirm Congressional intent that all contributions to Title III programs must be absolutely voluntary.

1321.71 LEGAL ASSISTANCE

We have several general and specific concerns relative to this section. The first is the potential negative consequences of the simplification of these regulations. We believe they could constrain the ability to provide legal services, and we believe that the terms "legal services" and "assistance" are applicable to describing this program.

We urge a substantial re-writing of Sections (h), (i) and (j) of the proposed regulations. We fail to see any legislative basis within P.L. 100-175 for such an expansion of the restrictive language on prohibited political activities. We believe the final rules should more closely resemble existing regulations in this area.

1326. GRANTS TO INDIAN TRIBES

We urge that the final regulations specifically provide for the implementation of the provisions of P.L. 100-175 which authorized the establishment of an Associate Commissioner for American Indians, Alaskan Natives and Hawaiian Natives. The regulations should detail the organizational status of the Office, its functions and its overall relationship to the other programs in the Act especially those provided under Title III.

We also urge that the final regulations contain specific language detailing the establishment of the Interagency Task Force to examine policies and issues related to older Indians and their need for services.

(more)

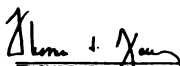
Finally, we call for specific language in the interim final regulations detailing how Title III and VI services will be coordinated under new provisions of P.L. 100-175 which allow for dual eligibility of Indian and Alaskan Native elders.


We anticipate that you will give these suggested revisions in the proposed regulations your most serious consideration. We again request that you issue these regulations as interim final regulations. In this way, in those areas where there is no dispute, they would be fully operational. However, if there continue to be issues in conflict with the intent of Congress for the ability of the law to be effectively implemented, we could provide some additional legislative authority to extend the regulatory process.


All of us who have signed this letter serve on Committees which have a direct interest in the Older Americans Act either from the standpoint of appropriations, authorizations and/or oversight. We realize that these regulations will govern the day-to-day operations of the Older Americans Act. We, therefore, want them to not only accurately reflect the intent of Congress but also to maintain the basic strength of the Act which has been the effective delivery of services to millions of seniors by states and area agencies and service providers.


With best wishes, we are

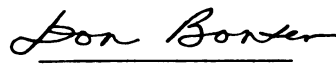
Sincerely,



 THOMAS J. DONNEY
 Acting Chairman
 Subcommittee on Human Services


 MARIO BIAGGI, M.C.


 EDWARD R. ROYBAL
 Chairman
 House Select Committee on Aging


 OLYMPIA J. SNOWE
 Ranking Minority Member
 Subcommittee on Human Services


 DON BONKER
 Chairman
 Subcommittee on Housing and
 Consumer Interests


 MATTHEW J. RINALDO
 Ranking Minority Member
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Thomas J. Manton
 THOMAS J. MANTON, M.C.

Sherwood Boehlert
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Tom Lantos
 TOM LANTOS, M.C.

James J. Florio
 JAMES J. FLORIO, M.C.

Mike Synar
 MIKE SYNAR, M.C.



DEPARTMENT FOR THE AGING

2 LAFAYETTE STREET
New York City, New York 10007
JANET S. SAINFR, Commissioner
212-577-0827

May 24, 1988

Carol Fraser Fisk
Commissioner
Administration on Aging
Department of Health and Human Services
300 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Commissioner Fisk:

The New York City Department for the Aging has reviewed the proposed rules to implement the Older Americans Act Amendments of 1987. We commend the Administration for timely production of these rules and support the principles employed in their development. We particularly endorse,

- 1) that all regulations are clearly within the authority delegated by law and consistent with Congressional intent;
- 3) provide maximum flexibility to State and local governments and
- 6) eliminate regulations not serving a compelling Federal interest or reform those not implemented in the least intrusive means available.

The Department therefore supports the principle of the Administration on Aging to issue rules only when clarification of the Act is necessary. Our recommendations for changes and deletions will therefore be based on (a) whether the language of the Act is self evident and requires no rules or we believe the rules do not accurately reflect the language and intent of the law.

The Department which is both an Area Agency on Aging as well as a Mayoral Agency has achieved the goals of the Older Americans Act by securing funds from both the public and private sectors to improve the quality of life of older New Yorkers. The Older Americans Act provides 45.5% of our funding with local tax levy support for 34.5% and the State 20% of our dollars. The private sector through our City-Meals-On-Wheels program raises \$2.25 million for a 6th and 7th day home delivered meal for our frailest aged. The Department's budget does not reflect the true commitment of New York City to its elderly. Our advocacy has secured local Rent Increase Exemption and Homeowner

Property Tax Abatement programs which subsidize close to 90,000 aged households from increases in housing costs. The City also assumes 10% of the costs of Medicaid supported homecare. We also have the largest half-fare public transit program established through the advocacy of the Office for the Aging, the precursor of the Department for the Agency as an Area Agency on Aging and Mayoral Agency, which permits over 700,000 of our aged to use mass transit for half fare. This Area Agency on Aging's advocacy agenda and service delivery system reflects the unique local conditions of New York City, the most ethnically, racially and culturally diverse City in the world. It is a City where two-thirds of the elderly are renters, where immigration can change the language and makeup of communities in less than a decade.

We therefore concur in AoA's statement under Background that "The reauthorized Act reaffirms expectations that AoA, State Agencies on Aging and Area Agencies on Aging provide leadership at their respective levels. . . ." Since the amendments in no way change the functions and responsibilities of the various actors, and since the Act has always seen as pivotal the "planning" for local service areas, we recommend that all rules beyond the specific responsibilities of State Offices and their relationship to AAA's contained in the Act be deleted. Defining AAA's as "agents of the state", limiting their advocacy agendas, or assigning "enforcement" functions to the State, diminishes the autonomy of AAA's. The Act is sufficiently explicit on functions of State and Area Agencies on Aging.

Sub Part A 1321.1 is unnecessary. The existing rules and the law provide sufficient guidance. There is no basis in law for Section (c) which describes the AAA as an "agent" of the State. § 1321.39 of the existing rules needs no modification. § 1321.35 should therefore be deleted, particularly (3) "Policies and procedures established by State Agency on Aging" and (4) "or in conflict with the requirement of the Act that it function only as an Area Agency on Aging."

We also recommend that §1321.55 be deleted since it goes beyond the law in its interpretation of what entity may be an Area Agency on Aging. These rules appear to require that the 75% of AAA's which are part of existing umbrella agencies would have to be dedesignated and separate units become legal entities to enter into contracts. Further §1321.5 (3) and (4) would limit the activities of AAA's since the language implies that the State Office may establish policies and procedures which go beyond the Act. (Four) which limits the roles of AAA's to functioning only as AAA's does not acknowledge either the multiple funding of these entities nor the fact that they may have local statutory bases which require that they administer other than Older Americans Act funded services for the aging. The creators of the Older Americans Act and its Amendments showed brilliant foresight in creating AAA's which could be either public or voluntary agencies and would respond to local governance structures. These rules therefore have the potential for permitting State agencies to formulate these functions and structures beyond the intent of the Older Americans Act. We therefore recommend that Subpart (C) Area Agencies' responsibilities §1321.53 Mission of the Area Agency be deleted.

3.

The language of the Act with the 1987 Amendments requires no additional rules. No prior rules exist since it was deemed in 1985 that the law was sufficiently explicit. We particularly object to restrictive language regarding AAA's functioning under "the leadership and direction" of the State agency. It should be noted that the Act requires that State Plans be based on Area Agency Plans.

In addition, (10) under §1321.53 uses language which opens dangerous possibilities for violating existing standards governing staff selection of AAA's. There is no statutory basis for [10]. The qualification of the Director of an AAA should be based on standards which are measurable.

The Department recommends that §1321.61 Advocacy responsibilities of the Area Agency be deleted. The law is specific and requires no rules beyond those contained in §1321.65 - the current rules. It should be noted that proposed rules place emphasis primarily on advocacy for the development of comprehensive and coordinated community based systems of services. AAA's depending on local conditions may be required to give priority to housing or transportation in their area.

Sub Part D Service Requirements §1321.63 should also be deleted. The law is explicit and requires no further refinements. These comments also apply to §1321.65 which is adequately covered in the legislation.

We believe that since the 1987 Amendments included only one change in the section on Advisory Councils - adding "providers of veterans health care (if appropriate)" - the existing rules require only a minor modification. §1321.57 Area Agency advisory council not only goes beyond the law but also includes a new category (3) Representatives of supportive services providers organizations. Many Area Agencies specifically exclude representatives of any agency which is funded with Older Americans Act dollars. There is an inherent conflict of interest in having providers serve on the advisory council to the funding agency. If all the proposed rules for §1321.57 are not deleted, we specifically recommend that (3) be deleted. Only groups identified in the law should be included.

We believe the Amendments are sufficiently specific concerning responsibilities of service providers to make §1321.65 unnecessary.

§1321.69 (b) is not consistent with the amendments which permit AAA's "to establish procedures . . . to offer home delivered meals . . . to individuals with disabilities who reside at home with and accompany older individuals who are eligible under this Act." The rule is more restrictive than the Act by limiting eligibility to the "spouse."

We recommend that (h)(3) be changed to add "partisan" before political activity. Any political activity is too vague.

In addition, the Department recommends the following specific change if §1321.1 is not deleted: (C) delete "to serve as its agent . . . throughout the state". §1321.3 Definitions. Direct service definition is too broad and should be deleted and definition of periodic should be changed from "at a minimum, once each fiscal year" to "within the course of the multi-year plan." Once again, the definitions are unnecessary since the Act is specific.

4.

The rules governing the State Agencies §1321.7 should either be deleted or amended. (a) "The State agency shall be the leader relative to all aging issues" not only is unrealistic in terms of resources but does not acknowledge that the priorities of AAA's in the State may differ from the State Office. Further State Offices are creatures of Governors and must support his or her political position. AAA's must be free to pursue programs and funding for services for the elderly which may not have the support of the State Offices. (b) should be deleted since the language is loose and provides the State Office with a basis for dedesignation which goes beyond the law. There is no language in the Act concerning missions but rather a list of functions. Further, with multiple funding and statutory mandates from local governments the AAA's should not be limited by State policies.

The Department strenuously objects to the deletion of §1321.9 (5)(1) from the current rules. Use of Title III funds for program development is essential.

The Department urges the Administration on Aging to simplify these rules by deleting all sections that either go beyond the law or are repetitious of the language of the Act. We further recommend that the Administration reissue proposed regulations to permit the network to evaluate changes made on the basis of the comments received.

Sincerely,



Roberta R. Spohn
Deputy Commissioner

COUNTY OF SUFFOLK



PATRICK G. HALPIN
SUFFOLK COUNTY EXECUTIVE

OFFICE OF THE COUNTY EXECUTIVE
HUMAN SERVICES DIVISION

EVELYN ROTH
DEPUTY COUNTY EXECUTIVE
JOAN WARD
COUNTY EXECUTIVE ASSISTANT

May 24, 1988

OFFICE FOR THE AGING
JOHN BIANCHET
ACTING ADMINISTRATOR

Honorable Thomas J. Downey
Acting Chairman
U.S. House of Representatives
Select Committee on Aging
716 House Office Building Annex 1
Washington, DC 20515

Dear Congressman Downey:

As requested in the proposed regulations of the Administration on Aging, issued in the Federal Register of March 29, 1988, the following comments address three (3) areas of concern for our area agency.

A significant change in the proposed regulations is the deletion of a section in the current regulations (Sect. 1321.55) that says "the State agency may not require the area agency to submit to it for prior review or approval any proposed subgrants or contracts with public or private nonprofit agencies or organizations." With the deletion of this section, the authority of the State is expanded to submit for prior review or approval any proposed subgrants or contracts. This rule change would, if strictly interpreted by the State, seriously impact the ability of the area agency to contract with developing organizations. New initiatives may be impeded by delays in the approval process. Furthermore, the current regulations protect the area agencies from influence by the State, and prevents politics from the State being imposed in the subgrants and contracts system.

Of concern is the change in the proposed regulations which raises the allowable area agency administrative cap from 8.5 percent to 10 percent while, at the same time, eliminating funding for program development and coordination activities. The regulation allowing service funds to be used for program development and coordination in the current act is based on the fact that such activities are necessary to administer area plans.

Clarification should be made in the new language found in Subpart C - Area Agency Responsibilities, Sect. 1321.53 of the proposed regulations wherein the "area agency shall proactively carry out, under the leadership and direction of the State agency,

...continued...

- 2 -

Honorable Thomas J. Downey

May 24, 1988

a wide range of functions..." What the word "direction" is intended to mean is not clear. Is it the intent of the regulations to make the area agencies the agents of the State? Local units of government would have to question the relationship of the area agency to the State. The cooperative relationship, which has existed for many years, the partnership developed in serving the elderly may be in danger if area agencies are instructed to function under the "direction" of the State agency.

Thank you for the opportunity to review the proposed regulations. It is our hope that the revisions to the Older Americans Act will strengthen the aging services network.

Very truly yours,



John Bianchet
Acting Administrator

JB:ed



National
Association of
Regional
Councils

1700 K St., N.W., Washington, D.C. 20006 • Area Code (202) 457-0710

May 31, 1988

The Honorable Carol Fraser Fisk
Commissioner, Administration on Aging
Department of Health and Human Services
330 Independence Avenue, SW
Room 4760
Washington, DC 20201

Dear Commissioner Fisk:

The National Association of Regional Councils (NARC) appreciates the opportunity to comment on the proposed rulemaking for the Older Americans Act (OAA), as amended, dated March 29, 1988. These comments are written on behalf of NARC in accordance with our policy and a resolution unanimously adopted by the General Membership of NARC at the 22nd Annual Conference on May 24, 1988 (attached). Please note that these comments do not preempt or supersede the individual responses of our members.

First, the single organizational unit language in Section 1321.55 of the proposed regulations causes confusion over whether an Area Agency on Aging (AAA) must be a distinct entity separate from its currently AAA designated umbrella agency. This confusion could cause needless decertification and/or recertification of currently designated Area Agencies on Aging and disrupt vital services to seniors. Therefore, NARC recommends revising this provision so that the regulation unambiguously permits the continued designation of umbrella agencies, such as regional councils, cities and counties as Area Agencies on Aging, but requires that aging programs in such entities be distinctly identifiable, accessible and visible to the elderly at offices of the umbrella agency. These requirements will comport fully with the recent Congressional amendments to the Act.

Second, the elimination of language in Section 1321.17 of the proposed regulations permitting the use of supportive services funds for program development and coordination would disallow an essential opportunity to increase and develop new services. Should this new proposal stand, vital program development and coordination activities will cease. Therefore, NARC recommends deletion of all references in the proposed regulation that would disallow such costs that exceed the 10% administration cost cap as eligible activities. NARC further recommends retention of the existing regulation which permits such funding.

President
SIDNEY J. BARTHELEMY
NEW ORLEANS, LOUISIANA

First Vice President
T. J. "TED" HACKWORTH
DENVER, COLORADO

Second Vice President
GUS F. MUTSCHER
BRENNHAM, TEXAS

Immediate Past President
JONATHAN B. HOWES
RESEARCH TRIANGLE, NORTH CAROLINA

Executive Director
RICHARD C. HARTMAN

Third, the proposed regulations, in Section 1321.7, requires the state agency on aging treat Area Agencies on Aging as their principal agents in carrying out the mission of the state agency at the substate level. Also, the proposed regulations in Section 1321.53, includes a mission statement for area agencies that appears to preempt local input and control. Both these proposed provisions modify the current program administration approach that incorporates "top down" planning as opposed to a "bottoms up" local determination of aging needs and planning. Therefore, NARC recommends deletion of the section regarding the mission of Area Agencies on Aging (AAA), as well as a references calling for AAAs to be principal agents of the state. A "bottoms up" rather than a "top down" planning process would best ensure that the needs of the nation's elderly population remain a grassroots process whereby local needs and priorities are the foundation for the program.

Thank you for the opportunity to comment on the proposed OAA regulations and for considering our concerns. NARC looks forward to continuing to work with you to improve services to older Americans.

Sincerely,



T.J. Ted Hackworth
President

Enclosure

cc w/ enc: The Honorable Spark M. Matsunaga
The Honorable Thad Cochran
The Honorable Edward M. Kennedy
The Honorable Orrin G. Hatch
The Honorable Lawton Chiles
The Honorable Lowell P. Weicker
The Honorable John C. Stennis
The Honorable Mark O. Hatfield
The Honorable John Melcher
The Honorable John Heinz
The Honorable Thomas J. Downey
The Honorable Olympia Snowe
The Honorable Edward Royba
The Honorable Matthew Rinaldo
The Honorable Dale E. Kildee
The Honorable Thomas J. Tauke
The Honorable Augustus F. Hawkins
The Honorable James M. Jeffords
The Honorable William H. Natcher
The Honorable Silvio D. Conte
The Honorable Jamie L. Whitten
The Honorable Claude Pepper
The Honorable Mario Biaggi
The Honorable Otis R. Bowen
The Honorable James C. Miller, III

RESOLUTION ON PROPOSED REGULATIONS

FOR THE OLDER AMERICANS ACT, AS AMENDED .

WHEREAS, The existing network of Area Agencies and State Units on Aging is a proven framework and has served our Nation's elderly well; and

WHEREAS, it is the position of NARC that regional councils with the concurrence of local governments should continue to be the entity given preference for administering aging programs and not be eliminated in favor of single-purpose organizations and/or other nonprofit organizations; and

WHEREAS, the proposed regulations implementing the 1987 amendments to the Older Americans Act, promulgated on March 29, 1988, has caused confusion over whether the Administration on Aging has interpreted the intention of the recent amendments to the Act to require the dedesignation of the estimated 75% of currently designated area agencies on aging which are umbrella agencies, such as regional councils, cities and counties; and

WHEREAS, these proposed regulations require that the state agency on aging shall treat area agencies on aging as their principal agents to carry out the mission of the state agency at the substate level thereby modifying the administration of the program toward "top down" planning

as opposed to "bottoms up" local determination of aging needs and planning; and

WHEREAS, the proposed regulations would prohibit the states and area agencies from allocating any federal funding over the 10% limit on administrative and planning expenses for the purpose of defraying the costs of necessary program development and coordination activities.

NOW THEREFORE BE IT RESOLVED BY THE GENERAL MEMBERSHIP OF THE NATIONAL ASSOCIATION OF REGIONAL COUNCILS IN CONFERENCE ASSEMBLED THAT:

- (1) NARC staff shall develop comments on the proposed regulations that would call for:
 - (a) the continued designation of umbrella agencies, such as regional councils, cities and counties as Area Agencies on Aging, but require that aging programs be identifiable, accessible and visible to the elderly at offices of the umbrella agency; and
 - (b) striking all references in the proposed regulations that would disallow program development and coordination costs, that exceed the 10% administration cost cap, as eligible activities; and
 - (c) eliminate the section regarding the mission of the Area Agency on Aging (AAA) and all references calling for AAAs to be principal agents of the state, thus ensuring that the needs of the nation's elderly population remains a grassroots process where local needs

and priorities are the foundation for the program, and ensuring that planning remain a "bottoms up" rather than "top down" process.

- (2) Copies of NARC's comments on the regulations should also be transmitted to HHS Secretary Otis R. Bowen, OMB Director James C. Miller III, and all House and Senate authorizing and appropriations committee members concerned with the administration of the Older Americans Act.

Adopted May 24, 1988



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